No. 94-172-CFY
Status: GRANTED

Title: John Bruce Hubbard, Petitioner
v.
United States

Docketed:
July 27, 1994

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Morris,Paul

Counsel for respondent: Solicitor General

Time to file ext by J. Stevens to & inc July 28, 1994. CITED

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | May 9 1994 | G | Application (A93-922) to extend the time to file a petition for a writ of certiorari from June 28, 1994 to July 28, 1994, submitted to Justice Stevens. |
| 2 | May 10 1994 | | Application (A93-922) granted by Justice Stevens extending the time to file until July 28, 1994. |
| 3 | Jul 27 1994 | G | Petition for writ of certiorari filed. |
| 5 | Aug 25 1994 | | Order extending time to file response to petition until September 30, 1994. |
| 6 | Sep 30 1994 | | Order further extending time to file response to petition until October 6, 1994. |
| 7 | Oct 6 1994 | | Brief of respondent United States filed. |
| 8 | Oct 12 1994 | | DISTRIBUTED. October 28, 1994 (Page 14) |
| 10 | Oct 31 1994 | | Petition GRANTED. limited to the following question: Whether petitioner's convictions under 18 U.S.C. 1001 for knowingly making false statements in pleadings file with the bankruptcy court are barred by the so-called "judicial functionn" exception of Section 1001. ********** |
| 12 | Dec 9 1994 | | Order extending time to file brief of petitioner on the merits until December 20, 1994. |
| 14 | Dec 20 1994 | | Joint appendix filed. |
| 15 | Dec 20 1994 | | Brief of petitioner John Bruce Hubbard filed. |
| 13 | Dec 21 1994 | | SET FOR ARGUMENT TUESDAY, FEBRUARY 21, 1995. (1ST CASE) |
| 16 | Dec 23 1994 | | CIRCULATED. |
| 17 | Jan 5 1995 | | Record filed. |
| | | * | Original record proceedings U.S. Court of Appeals, Sixt Circuit and U.S.District Court, E. Dist. Michigan (BOX) |
| 18 | Jan 23 1995 | X | Brief of respondent United States filed. |
| 19 | Feb 21 1995 | | ARGUED. |

No. 94 172 JUL 27 1994



# In the Supreme Court of the United States

OCTOBER TERM, 1993

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JOHN BRUCE HUBBARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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53 pp

## QUESTIONS PRESENTED

1. WHETHER CERTIORARI REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING WHETHER TITLE 18 U.S.C. SECTION 1001 IS SUBJECT TO A "JUDICIAL FUNCTION" EXCEPTION OR AN "EXCULPATORY NO" EXCEPTION.

2. WHETHER IN FINDING UPON DIRECT APPEAL THAT THE PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE, THE COURT OF APPEALS SHOULD HAVE AFFORDED THE PETITIONER THE OPPORTUNITY TO PROVE PREJUDICE IN THE DISTRICT COURT PURSUANT TO 28 U.S.C. § 2255 RATHER THAN AFFIRM HIS CONVICTIONS ON THE BASIS THAT NO PREJUDICE COULD BE PROVEN.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 16 F.3d 694. A copy of the opinion is attached to this petition in the Appendix as App. 1-19. The Sixth Circuit denied rehearing on March 30, 1994. A copy of the order of denial is attached to the petition as App. 20.

## JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on February 15, 1994. (App. 1-19). The Sixth Circuit denied rehearing on March 30, 1994. (App. 20). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to July 28, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

## STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

### A. Procedural History

The petitioner was charged in a ten-count indictment with four counts of bankruptcy fraud in violation of 18 U.S.C. § 152, with three counts of making false statements in a matter within the jurisdiction of the federal government in violation of 18 U.S.C. § 1001, and with three counts of mail fraud in violation of 18 U.S.C. § 1341. A jury found him guilty on all counts. In addition to a term of incarceration, the petitioner was assessed consecutive fines on each count. On appeal to the Sixth Circuit, the petitioner challenged the sufficiency of the evidence on all counts. Alternatively, the petitioner sought a new trial because he was afforded ineffective assistance of trial counsel in violation of the Sixth Amendment.

In a split decision, the United States Court of Appeals for the Sixth Circuit affirmed. (App. 1-19). Rehearing was denied on March 30, 1994. (App. 20).

### B. Statement of the Facts

The petitioner was convicted of three counts of violating 18 U.S.C. § 1001 for falsely (1) stating in response to a bankruptcy trustee's motion to compel the petitioner to surrender his books and records that he had produced such records to the previous bankruptcy trustee; (2) answering a bankruptcy trustee's complaint with a denial; and (3) answering with a denial an additional allegation of the trustee. None of these alleged falsehoods was made under oath.

The petitioner contended that his convictions on these counts could not stand for several reasons including the following: the statements fell within the "exculpatory no" exception to liability under § 1001; and the statements fell



within the "judicial function" exception to § 1001 liability.

The court of appeals rejected the petitioner's "exculpatory no" argument on the ground that the Sixth Circuit had declined to adopt the doctrine in *United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 303 (1991).

The court of appeals also refused to adopt the judicial function exception reasoning as follows:

> First, the Supreme Court in [*United States v.*] *Bramblett*, [348 U.S. 503 (1955)] said that § 1001 was to be read broadly and never indicated that there might be such a thing as a judicial function exception. Second, we agree with the [*United States v.*] *Poindexter*[, 951 F.2d 369 (D.C.Cir.1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 656 (1992)] court [footnote reference omitted] that the judicial function exception does not rest on solid legal ground. Third, if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath and therefore none could be prosecuted as perjury. Finally, we read the Court's footnote in [*United States v.*] *Rodgers*[, 466 U.S. 475, 483 n.4 (1984)] as cautioning against an automatic acceptance of the validity of the judicial function exception; we will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit.

(App. 13).

Judge Nelson dissented from this reasoning based upon *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967) and its underpinning, *Morgan v. United States*, 309 F.2d 234

(D.C.Cir. 1962), *cert. denied*, 373 U.S. 917 (1963). Judge Nelson relied upon the following passage quoted from *Morgan* in *Erhardt*:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action * * * which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court."

(App. 18-19). From this precedent, Judge Nelson reasoned as follows:

> If the introduction of false documents in court proceedings is conduct connected with the operation of the court's judicial machinery, and not with the performance of an administrative or housekeeping function, I can see no principled basis for concluding that the making of unsworn false statements in court proceedings is not likewise connected with the operation of the judicial machinery. Accordingly, I respectfully dissent from the affirmance of defendant Hubbard's conviction on the false statement counts of the indictment.

(App. 19).

The petitioner also challenged on direct appeal all of his convictions based upon the ineffectiveness of his trial counsel. The court of appeals agreed that petitioner's trial counsel was so incompetent that the petitioner satisfied the so-called "deficiency prong" of the two-pronged test for ineffectiveness of counsel set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). However, the court of appeals concluded, based solely upon the transcript



of the trial, that the petitioner could not satisfy the "prejudice prong" of *Strickland* because the petitioner "cannot show that his resulting convictions are unreliable or constitutionally defective. Because there is no reasonable probability that but for his counsel's errors the result of his case would have been different, we reject his ineffective assistance of counsel claim." (App. 17).

The petitioner sought rehearing on the ground that a determination whether trial counsel's incompetence resulted in prejudice required an evidentiary hearing. (App. 22-23). The petitioner requested leave to file a motion to vacate pursuant to 28 U.S.C. § 2255 in order to prove that he was prejudiced by the ineffectiveness found by the court of appeals. The court of appeals denied the petition for rehearing. (App. 20).

## REASONS FOR GRANTING THE WRIT

I.

The courts of appeals are split over two issues presented in this case: (1) whether the "exculpatory no" doctrine applies to 18 U.S.C. § 1001; and (2) whether there is a "judicial function exception" to § 1001. Determination of the second issue was expressly left open by this Court in *United States v. Rodgers*, 466 U.S. at 483. This Court is asked to resolve the split in the circuits and to address the question left unanswered in *Rodgers*.

II.

On direct appeal, the court of appeals ruled that the petitioner's trial counsel was incompetent. Nevertheless, the court affirmed the petitioner's convictions finding no prejudice. The petitioner was wrongfully denied leave to prove prejudice at an evidentiary hearing pursuant to 28 U.S.C. § 2255.

An accused whose trial counsel is found ineffective in violation of the Sixth Amendment should be afforded an evidentiary hearing to demonstrate prejudice. A determination that counsel's incompetence did not prejudice the accused should not be reached by a court of appeals based solely upon review of the transcript of the trial. It is often what incompetent counsel failed to do which prejudices the defendant. A trial transcript will not reflect such inadequacies, particularly deficiencies in pretrial investigation and discovery, which were apparent here.

Certiorari review is requested to clarify the burden of an accused under *Strickland v. Washington*, *supra*, and the relationship between direct appeal and 28 U.S.C. § 2255 in the context of effective assistance of counsel issues.



## ARGUMENT

I.

**CERTIORARI REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING WHETHER TITLE 18 U.S.C. SECTION 1001 IS SUBJECT TO A "JUDICIAL FUNCTION" EXCEPTION OR AN "EXCULPATORY NO" EXCEPTION.**

A.

The so-called "judicial function" exception renders 18 U.S.C. § 1001 inapplicable to conduct occurring before a court acting in its judicial capacity. The exception is generally traced to the decision of the District of Columbia Circuit in *Morgan v. United States*, *supra*. The exception has received wide approval. See *United States v. Deffenbaugh Industries, Inc.*, 957 F.2d 749 (10th Cir.1992); *United States v. Masterpol*, 940 F.2d 760, 766 (2d Cir.1991); *United States v. Holmes*, 840 F.2d 246, 248-49 (4th Cir.), *cert. denied*, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); *United States v. Lawson*, 809 F.2d 1514, 1519 (11th Cir.1987); *United States v. Mayer*, 775 F.2d 1387 (9th Cir.1985); *United States v. Abrahams*, 604 F.2d 386, 393 (5th Cir.1979); *United States v. D'Amato*, 507 F.2d 26 (2d Cir.1974).

Based upon footnote 4 of *United States v. Rodgers*, 466 U.S. at 483 n.4, wherein this Court recognized this line of authority but expressed "no opinion on the validity of this line of cases", the court of appeals in the case at bar declined to apply the judicial function exception to the petitioner's case. "[W]e will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit." (App. 13).

The petitioner respectfully requests that this Court resolve the split among the circuits and answer the request of the Sixth Circuit for guidance.

The instant case is also worthy of review to resolve the related question whether § 1001 warrants the punishment of "traditional trial tactics". *Morgan v. United States*, *supra*. The pleadings which were condemned in the petitioner's indictment are of the type which have been filed since the dawn of "denials" in civil litigation. Historically, such denials are mandatory if the respondent seeks to place a claim at issue. Pursuant to the holding below, attorneys and their clients can face criminal sanctions for such denials entered in response to complaints filed in civil judicial proceedings.

The courts have other means at their disposal for ferreting out or protecting themselves from inaccurate or false denials. See *e.g.*, 18 U.S.C. §§ 401 (contempt), 1501 et seq. (obstruction of justice), 1621 (perjury), 1622 (subornation of perjury), 1623 (false declarations before a court or grand jury), as well as bar proceedings. No useful purpose is advanced by further burdening the already overburdened courts with a requirement that counsel investigate the "truthfulness" of clients' mere denials. By holding the sword of § 1001 over the heads of all counsel and litigants in every federal civil proceeding where denials and admissions have traditionally been freely entered with an eye toward later adjudicating the merits, the Government will not only "inhibit vigorous advocacy of parties' interests", *Mayer*, 775 F.2d at 1389, it will bring a halt to a long-standing procedural means through which litigants have successfully resolved their differences.

In order to resolve the split among the circuits and for the additional reasons stated above, the petitioner requests issuance of the writ of certiorari.



B.

The "exculpatory no" exception to § 1001 prosecutions, in its most general terms, stands for the proposition that mere negative responses to government inquiries do not constitute "statements" within the meaning of § 1001. The doctrine has never been considered by this Court. Seven circuits have adopted the exception in one form or another. *United States v. Taylor*, 907 F.2d 801 (8th Cir.1990), *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir.1986); *United States v. Cogdell*, 844 F.2d 179 (4th Cir.1988); *United States v. Tabor*, 788 F.2d 714 (11th Cir.1986); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir.1980); *United States v. King*, 613 F.2d 670 (7th Cir.1980); *United Sates v. Chevoor*, 526 F.2d 178 (1st Cir.1975), *cert. denied*, 425 U.S. 935 (1976). Some circuits have neither adopted nor rejected the exception. *United States v. Barr*, 963 F.2d 641 (3d Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 811 (1992); *United States v. White*, 887 F.2d 267 (D.C.Cir.1989); *United States v. Capo*, 791 F.2d 1054 (2d Cir.1986), *vacated on other grounds*, 817 F.2d 947 (2d Cir.1987). Two circuits have rejected the exception, the Fifth Circuit in *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir.1994)(en banc), and the Sixth Circuit in the case at bar, adhering to its decision in *United States v. Steele*, *supra*.

This case is appropriate for review to resolve the split among the circuits.

## II.

**IN FINDING UPON DIRECT APPEAL THAT THE PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE, THE COURT OF APPEALS SHOULD HAVE AFFORDED THE PETITIONER THE OPPORTUNITY TO PROVE PREJUDICE IN THE DISTRICT COURT PURSUANT TO 28 U.S.C. § 2255 RATHER THAN AFFIRM HIS CONVICTIONS ON THE BASIS THAT NO PREJUDICE COULD BE PROVEN.**

The sixth amendment to the Constitution of the United States guarantees to all accused the right to effective assistance of counsel. *Strickland v. Washington*, *supra*. In order to set aside a conviction based upon ineffective assistance of counsel, a defendant must meet the *Strickland* standard which is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. at 687. Although the second "showing" or "prong" of the *Strickland* test is often referred to as the "prejudice" prong, a defendant need not prove that the verdict would have been different had he been afforded competent counsel. Rather, the issue is whether "there is a reasonable probability that, but for counsel's unprofessional



errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A defendant is not required to show that but for counsel's errors, the outcome of the proceeding would more likely than not have been different. As this Court held: "[A] reasonably probability is a probability sufficient to undermine confidence in the outcome." *Id.* (emphasis added).

The petitioner raised the ineffective assistance of counsel claim for the first time on direct appeal. The proof on the face of the record on appeal that counsel's performance was deficient was compelling. Indeed, the court of appeals agreed that the record proved the petitioner's trial counsel was incompetent. For example, after the jury returned its verdicts of guilt, the petitioner's trial counsel signed a statement (which was filed in the district court in support of the defendant's application for bail pending appeal and filed in the court of appeals upon review of the district court's denial of bail which this court reversed) which recounted the following:

1. I [David H. Raaflaub] am a sole practitioner with law offices at 400 West Washington Street, Suite 7, Ann Arbor, Michigan 48103.

2. I was trial counsel for the defendant in United States v. John Bruce Hubbard, United States District Court, Eastern District of Michigan, Southern Division, Criminal No. 89-80747.

3. The trial was the first federal jury trial in which I was counsel for a party.

4. I had no prior experience in criminal federal litigation.

5. I did not review all of the discovery made available

by the Office of the United States Attorney.

6. I did not interview all of the potential defense witnesses.

7. I failed to object to various comments made and procedures undertaken by the presiding judge.

8. I believe that the defendant was afforded ineffective assistance of counsel.

(App. 27). In addition to the foregoing, the petitioner established that from the outset of his case, trial counsel failed to perform the most rudimentary of constitutional obligations in defense of the accusations. Counsel's deficiencies rendered indisputable the conclusion that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*. For these reasons, the court of appeals ruled that the first prong of *Strickland* was satisfied.

With regard to the second or "prejudice prong" of *Strickland*, the petitioner sought reversal on direct appeal on the basis that in a case such as this, where the gross incompetence of counsel was evident prior to trial, thereby presumptively tainting the defense as well as plea negotiations, and where during trial defense counsel's ignorance of the law and facts was so extraordinary that it was the repeated subject of admonishments from the district judge, prejudice should have been presumed. The petitioner argued that just as there is a *per se* violation of the right to assistance of counsel where the accused is represented by someone who (unbeknownst to the defendant) is not a lawyer, see *Solina v. United States*, 709 F.2d 160, 167-69 (2d Cir.1983), there is no less a *per se* violation where the accused is represented by counsel who is as ill-equipped as a non-lawyer. Put another way, the petitioner in this case was afforded, at best, no counsel at all. The petitioner contended that he should not be



held to a standard of proving prejudice where the lack or absence of any meaningful representation at all was at the heart of his complaint.

In the alternative, the petitioner argued that the record on appeal supported his claim of ineffectiveness under the *Strickland* standard for prejudice because the representation afforded "undermined confidence" in the outcome of the proceedings. Trial counsel's own affidavit of incompetence offered strong support for a lack of confidence in the outcome of the trial. Additionally, the evidence of the petitioner's guilt was hardly overwhelming as evidenced by his attack on appeal upon the sufficiency of the evidence to support each of his convictions. Moreover, available defenses, even those apparent on the face of the indictment, were not presented by petitioner's trial counsel. The lack of competent counsel also effectively negated any possibility of plea negotiations in a case which appeared to be a prime candidate for resolution without incarceration.

The court of appeals declined to find prejudice on direct appeal. However, rather than affirm without prejudice to the petitioner's right to raise the issue before the district court, the court of appeals expressly ruled that the petitioner could not prove prejudice.

The petitioner should have been afforded an evidentiary hearing to prove prejudice. Traditionally, the courts of appeals will not entertain claims of ineffective assistance of counsel on direct appeal, holding that these claims should first be presented to the trial court pursuant to 28 U.S.C. § 2255. "In general, a claim of ineffective assistance of counsel cannot be determined on direct appeal when it was not raised in the district court; in such a case there has been no opportunity to develop evidence in the record bearing on the merits of the claim." *United States v. Rinard*, 956 F.2d 85, 87 (5th Cir.1992).

However, in the case at bar, the court of appeals, without the benefit of an evidentiary hearing on the issue, without first affording the district court the opportunity to pass upon the question, and based solely upon the transcript of the petitioner's trial wherein he was represented by incompetent counsel, determined that the petitioner was not prejudiced. It is questionable whether lack of prejudice can ever be gleaned from the transcript of a trial conducted by incompetent defense counsel because such a transcript would not reflect that which defense counsel had failed to do on behalf of the accused.

For these reasons, the decision below is worthy of review by this Court.



## CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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DATED: July 1994.

## APPENDIX

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*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0050P (6th Cir.)
File Name: 94a0050p.06

No. 91-1775

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

JOHN BRUCE HUBBARD,
*Defendant-Appellant.*

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed February 15, 1994

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Before: NELSON and BATCHELDER, Circuit Judges; and MATIA, District Judge.*

BATCHELDER, Circuit Judge, delivered the opinion of the court, in which MATIA, District Judge, joined. NELSON, Circuit Judge (pp. 18-19), delivered a separate opinion concurring in part and dissenting in part.

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*The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.



ALICE M. BATCHELDER, Circuit Judge. Defendant Hubbard was charged in a ten-count indictment with four counts of bankruptcy fraud in violation of 18 U.S.C. § 152, with three counts of making false statements in a matter within the jurisdiction of the federal government in violation of 18 U.S.C. § 1001, and with three counts of mail fraud in violation of 18 U.S.C. § 1341. A jury found him guilty on all counts. He appeals, arguing (1) the evidence was insufficient to convict him of any and all counts and (2) his trial counsel's performance violated his Sixth Amendment right to the effective assistance of counsel.

## I

The counts of conviction revolve around Hubbard's dealings in two different matters: his bankruptcy proceedings and his ownership of a Fino boat.

On September 25, 1985, Hubbard filed a petition for Chapter 7 bankruptcy. Pursuant to the bankruptcy petition and in the course of certain adversary proceedings, Hubbard was deposed on at least four occasions regarding his assets, his transfer of those assets, their value, and their whereabouts. At each of these depositions, Hubbard was put under oath and he swore to tell the truth. The government prosecuted Hubbard for false statements he made during these depositions.

Also during the bankruptcy proceedings, the bankruptcy trustee filed a motion for surrender of the books and records of Hubbard's businesses. Hubbard filed a written response to this motion. The bankruptcy trustee also filed an amended complaint, to which Hubbard responded with a formal pleading, "Debtor's Answer to Trustee's First Amended Complaint." The government prosecuted

Hubbard for written statements he made in his response to the motion and in his Answer.[1]

## II

### *A. Sufficiency of the Evidence*

We review the sufficiency of the evidence for a criminal conviction under the standard set out in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979): "[W]hether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

#### *1. Bankruptcy Fraud Counts (Counts I-IV)*

The indictment charged in each of the first four counts that many of Hubbard's answers during his deposition were false: count I alleged that Hubbard gave false answers in response to eleven specified deposition questions on October 23, 1985, count II alleged that Hubbard gave false answers in response to three specified deposition questions on November 13, 1985, count III alleged that Hubbard gave false answers in response to eleven specified deposition questions on February 7, 1986, and count IV alleged that Hubbard gave false answers in response to eighteen specified deposition questions on June 17, 1986. Hubbard asserts that the answers he gave during his depositions were not materially false. Because this is a sufficiency of the evidence claim, if we find that any one of Hubbard's allegedly false statements was a violation of 18 U.S.C. § 152, that count of conviction must be upheld.

We have carefully reviewed the questions asked and the statements given and have concluded that it would serve no useful purpose to go into detail on each and every count of conviction. The evidence was plainly sufficient to support

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[1]We defer discussion of the Fino boat to the analysis of the mail fraud counts (the related counts of conviction).



the jury's conclusions, and we therefore affirm the first four counts of conviction.

#### *2. False Statement Counts (Counts V-VII)*

Counts V, VI, and VII charged Hubbard with violating 18 U.S.C. § 1001 for (1) stating in response to the bankruptcy trustee's motion to compel Hubbard to surrender his books and records that he had produced such records previously to the previous bankruptcy trustee (which he had not), (2) answering the bankruptcy trustee's complaint by denying that a certain well-drilling machine was stored a particular place when in fact Hubbard knew that it was, and (3) falsely denying the bankruptcy trustee's further allegation that parts to the well-drilling machine were being stored at a different specified location. None of these alleged falsehoods was made under oath.

Hubbard contends that his conviction on these counts cannot stand for several reasons. First, his untruthful statements were trivial falsehoods and were thus not material as required by § 1001.[2] Second, his statements fall within the "exculpatory 'no'" exception to liability under § 1001. Third, the statements fall within the "judicial function" exception to § 1001 liability. Finally, the plain language of the statute does not encompass this activity.[3]

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[2]Hubbard also argues that his statements were not shown to have the capability of influencing the functions of a government agency, but this is part and parcel of the materiality inquiry, *see United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir.) (en banc), *cert. denied*, 112 S. Ct. 303 (1991), so we do not address this argument independently.

[3]Hubbard's brief can also be read to suggest two additional arguments: (1) that his responses were simply "traditional trial tactics" and thus cannot violate § 1001, and (2) that evidence was taken from his attorney in violation of the attorney-client privilege.

Both of these arguments fail. First, whether or not it is a "traditional trial tactic" to answer a complaint with affirmative falsehoods, we need not sanction such action and therefore will not

As a preliminary matter, we must address an argument that the government raised at oral argument: because Hubbard failed to raise the judicial function exception defense before trial, Federal Rule of Criminal Procedure 12(f) bars him from raising it now. We disagree with the government's suggestion. Rule 12(b) identifies five types of defensive moves (motions, requests, or defenses) that must be made prior to trial, and Rule 12(f) provides that the failure to raise one of these types of claims before trial waives that claim. Hubbard's argument is most closely described by Rule 12(b)(2), which requires that the defendant raise before trial "[d]efenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)."

Hubbard's argument is not merely a formalistic objection to a defect in the indictment; instead, his argument goes to the heart of whether, as a matter of law, he can be convicted of the crime with which he was charged. Thus, his claim falls within Rule 12(b)(2)'s parenthetical, which excepts his argument from the waiver provisions of Rule 12. *Cf. Davis v. United States*, 411 U.S. 233, 241 (1973) ("The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings."). We therefore proceed to the merits of Hubbard's contentions.

Hubbard's first two arguments can be disposed of quickly. First, his misrepresentations were clearly material under the standard set out in *United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir.) (en banc), *cert. denied*, 112 S.

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create an exception so broad as to include Hubbard's conduct. *Cf.* discussion *infra* note 5. Second, the information elicited from Hubbard's attorney was not protected by the attorney-client privilege because what Hubbard communicated to his attorney was to be conveyed to the bankruptcy trustee and the court via written pleading and thus was not protected by the privilege: the privilege extends only to *confidential* communications, not *all* communications.



Ct. 303 (1991), because they had the capability of influencing the bankruptcy court's function in determining what assets the debtor had and where those assets were so that they could be made available for the repayment of creditors. Second, the "exculpatory 'no'" doctrine cannot be applied here because this Circuit has rejected that doctrine. *See Steele*, 933 F.2d at 1319-22.

Hubbard's third and fourth arguments are similar to one another and challenge his false statement convictions as unlawful as a matter of law even assuming his statements were materially false. This assignment of error poses a more difficult problem.

Section 1001 provides:

> Whoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (emphasis added). The question is whether statements made in written filings in the bankruptcy court (and intended for use by the court and the bankruptcy trustee) are statements made "in [a] matter within the jurisdiction of any department or agency of the United States."[4]

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[4] At first glance, one might be tempted to believe that the plain language of the statute prohibits application of § 1001 to the case at bar. In terms of ordinary usage, "department" and "agency" connote the divisions of the executive branch, e.g., the Treasury Department, the Department of Justice, the Environmental Protection Agency, etc., and not the whole or any divisions of the judicial or legislative branches--Congress is not the Department of Lawmaking, nor is the

In *United States v. Bramblett*, 348 U.S. 503 (1955), a case involving a false representation by a then Congressman to the House of Representatives' Disbursing Office that a named woman was entitled to compensation as his official clerk, the Court rejected the argument that § 1001 violations were limited to false statements made to the executive branch.

> The falsification here involved was held to be within the jurisdiction of the Disbursing Office of the House which it was thought could not meet the definitions in § 6 [*see* note 4 *supra*]. It seemed significant to the trial court "that Title 18, § 287 (formerly the first part of old Section 35) provides penalties against any one who 'makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim . . . knowing such claim to be false,'" whereas § 1001 does not contain such language. [*United States v. Bramblett*, 120 F. Supp. 857, 861 (D.D.C. 1954)].

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U.S. Court of Appeals the Appellate Adjudication Agency. And, the statutory definitions section of Title 18 seems to support this common sense view.

> As used in this title:
>
> The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6. Enacted in 1948 and unchanged since, § 6 sets up a presumption that the judicial branch is not a department or agency unless the context shows otherwise.

The Supreme Court, however, has instructed us that the "any department or agency" language of § 1001 is not to be restricted by § 6. *See* discussion *infra*.



> It might be argued that the matter here involved was within the jurisdiction of the Treasury Department, as the appellee's misstatements would require the payment of funds from the United States Treasury. Or, viewing this as a matter within the jurisdiction of the Disbursing Office, it might be argued, as the Government does, that that body is an "authority" within the § 6 definition of "agency." We do not rest our decision on either of those interpretations. The context in which this language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "department," as used in this context, was meant to describe the executive, legislative and judicial branches of the Government. The difference between the language of § 287 and that of § 1001 can only be understood in the light of legislative history. That history dispels the possibility of attaching any significance to the difference.

*Id.* at 509. This language from *Bramblett* makes it necessary to reject Hubbard's plain language argument because the Supreme Court has said that § 1001 includes false statements to the judicial branch.

Even though *Bramblett* does not admit of any exceptions to its sweeping language, the lower courts have carved out more than one. The most important of these for the case at bar is one suggested in this court's decision in *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967) (per curiam). In *Erhardt*, it was held that Erhardt did not violate § 1001 when he submitted a false writing and testified falsely at an earlier criminal proceeding against him: "We hold that appellant's conviction under § 1001 must be reversed . . . because § 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding." *Id.* at 175.

The *Erhardt* court relied in part on a statement made in *Morgan v. United States*, 309 F.2d 234 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963). In *Morgan*, the court affirmed the § 1001 conviction of a layman who held himself out before the courts as being admitted to practice law: "We hold only, on the authority of the Supreme Court construction [of § 1001 in *Bramblett*], that the statute *does* apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court." *Id.* at 237 (emphasis added). The *Erhardt* court relied on the following dictum from *Morgan*: "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'" *Id.* Although this language was directed at Morgan's argument that upholding his conviction for misrepresenting his status as an attorney would mean that it would be a § 1001 violation to engage in several traditional trial tactics, *e.g.*, defense counsel's closing argument on behalf of a client he knows to be guilty (as "covering up" the truth of the matter), *see id.*, the *Erhardt* court apparently believed that this statement supported the extension of the "traditional trial tactics" category to include falsified evidence and held that Erhardt's conviction must be reversed.

Relying on *Erhardt* and *Morgan*, several courts developed the "judicial function" exception to § 1001 liability. Some of these courts draw a distinction between a court's judicial functions and its administrative or housekeeping functions, and hold that § 1001 can be violated by false statements made in the administrative matters of the courts, but not the judicial functions of those courts. For example, falsely denying to a bankruptcy judge that one forged a particular bankruptcy document cannot be a violation of § 1001 because it was within the court's *judicial* capacity, *see United States v. Taylor*, 907 F.2d 801, 805 n.3 (8th Cir. 1990) (dictum; court based its decision on the "exculpatory 'no'" doctrine), submitting fictitious letters of recommendation for the district court to



consider at sentencing was within the *judicial* function of the court and could not be a violation of § 1001, *see United States v. Mayer*, 775 F.2d 1387 (9th Cir. 1985), giving a false name to a magistrate judge at a plea hearing was within a matter of the magistrate's *administrative* duties and thus was a violation of § 1001, *see United States v. Plascencia-Orozco*, 768 F.2d 1074 (9th Cir. 1984), false representations on statement of indigency were *administrative* and thus were a proper basis for § 1001 liability, *see United States v. Powell*, 708 F.2d 455 (9th Cir. 1983), *cert. denied*, 467 U.S. 1254 (1984), *and rev'd on other grounds*, 469 U.S. 57 (1984), giving a false name to a magistrate and filing a form consenting to proceed before the magistrate judge under the false name was within an *administrative* matter of the court and therefore subject to § 1001 liability, *see United States v. Holmes*, 840 F.2d 246, 248-49 (4th Cir. 1988), and filing a false performance bond in bankruptcy court was an *administrative* matter and therefore the § 1001 conviction was upheld, *see United States v. Rowland*, 789 F.2d 1169 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986). Other courts have applied the judicial function exception without considering the administrative/judicial dichotomy. *See United States v. Wood*, 6 F.3d 692, 694-95 (10th Cir. 1993) (false statements made to FBI agents acting under auspices of federal grand jury were "made in connection with a judicial proceeding" and were therefore "exempt from prosecution pursuant to the 'judicial function' exception"); *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749 (10th Cir. 1992) (false affidavit submitted to the Department of Justice in connection with a grand jury investigation came within judicial function exception to § 1001 liability); *United States v. Abrahams*, 604 F.2d 386, 393 (5th Cir. 1979) (making false statements concerning one's identity to a magistrate judge at a bail hearing could not violate § 1001 because "'§ 1001 is not a proper basis for charging a defendant with making a false statement in a judicial proceeding'" (quoting *Erhardt*); even though false statement was regarding an administrative matter, court relied on judicial function exception anyway). *But see United States v. Barber*, 881 F.2d 345, 349-50 (7th Cir.

1989) (submission of false letters to sentencing judge in another's criminal proceeding violated § 1001; court criticized the "so-called 'trial tactics' exception" and refused to apply it), *cert. denied*, 495 U.S. 922 (1990).[5]

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[5]Worth noting is that the District of Columbia Circuit, which authored *Morgan*, has criticized the other circuits that have relied on the *Morgan* dictum in establishing the judicial function exception:

> A number of courts, relying upon the *Morgan* dictum, have actually held that there is a "judicial function" exception to § 1001. . . .
>
> We are not persuaded to carve out a broad legislative function exception to § 1001 [as the defendant requested]. The *Morgan* dictum and apparently the subsequent opinions of other circuits are grounded primarily upon the concern that the statutory terms "conceals or covers up" not be applied to punish "traditional trial tactics":
>
> > Does a defendant cover up . . . a material fact when he pleads not guilty? Does an attorney cover up when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?
>
> *Morgan*, 309 F.2d at 237 (internal quotation marks omitted)....
>
> Although some of the other courts of appeals have since expanded upon the *Morgan* dictum, *e.g.*, *Mayer*, 775 F.2d 1387, we have not, and we doubt that the "traditional trial tactics" rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding. We see no reason, therefore, to extend the putative "judicial function" exception to protect one who knowingly makes a material false statement of fact in the course of a legislative inquiry. *See Mayer*, 775 F.2d at 1392 (Fairchild, concurring) ("virtually none of the significant decisions has really defined the [judicial function] exception [or] expounded a rationale," and there is no "compelling reason for extending the exception beyond the exact holdings" of prior cases).

*United States v. Poindexter*, 951 F.2d 369, 387 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992).



The Supreme Court has added one final wrinkle in this area. It recently cited *Bramblett* with approval and noted that it had not created or yet approved the judicial function exception: "These courts [the ones creating the exception] have held that, although the federal judiciary is a "department or agency" within the meaning of § 1001 with respect to its housekeeping or administrative functions, the judicial proceedings themselves do not qualify. [citing *Abrahams*, *Erhardt*, and *Morgan*]. We express no opinion on the validity of this line of cases." *United States v. Rodgers*, 466 U.S. 475, 483 n.4 (1984).

Of course, we are bound only by our own prior decisions and the decisions of the Supreme Court. Because no Sixth Circuit case has cited *Erhardt* and no Sixth Circuit case (either published or unpublished and available on an electronic database) has discussed the judicial function exception,[6] we are left only with *Bramblett* and *Erhardt* itself for guidance. And *Erhardt*'s foundation has been significantly weakened, if not entirely undercut, by the abolition of the two-witness rule in perjury prosecutions, the vitality of which was a primary concern in *Erhardt*. *See Erhardt*, 381 F.2d at 175 ("A contrary construction [one that permitted § 1001 liability for false testimony in a criminal proceeding] would undermine the effectiveness of the two-witness rule and of the perjury statute itself."). We therefore conclude that it is anything but clear that a judicial function exception is recognized in the law of this Circuit.

We find it unnecessary to reach the government's argument that "the 'judicial function exception' is

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[6]This is true even of *Erhardt* because *Erhardt* preceded the other circuits' development of the judicial function exception, gave as the rationale for its holding the avoidance of undermining the perjury statute, *see* discussion *infra*, and did not purport to be developing any such "judicial function" exception. And although the *Erhardt* court did cite *Morgan*, it cannot be said that *Erhardt* was implicitly adopting the judicial function exception from *Morgan* because (as discussed above) *Morgan* did not create any such exception.

inapplicable to false statements intended to conceal assets from the trustee and creditors for the ultimate purpose of retaining those assets after discharge because the determination and collection of assets constitutes an administrative, and not an adjudicative, function of the bankruptcy court" because we decline to adopt the judicial function exception. First, the Supreme Court in *Bramblett* said that § 1001 was to be read broadly and never indicated that there might be such a thing as a judicial function exception. Second, we agree with the *Poindexter* court, *see supra* note 5, that the judicial function exception does not rest on solid legal ground. Third, if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath and therefore none could be prosecuted as perjury. Finally, we read the Court's footnote in *Rodgers* as cautioning against an automatic acceptance of the validity of the judicial function exception; we will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit.

As a final and related ground for reversing his § 1001 convictions, Hubbard suggests that we follow cases such as *United States v. London*, 714 F.2d 1558 (11th Cir. 1983), and *United States v. D'Amato*, 507 F.2d 26 (2d Cir. 1974). We believe both are distinguishable.

In *London* it was held that an attorney who falsified a court order and gave it to his clients in order to defraud them of substantial sums of money did not violate § 1001. The *London* court held that § 1001 was concerned with misrepresentations made *to the government* and that an attorney's fraudulent statement *to his clients*, even though related to ongoing federal civil litigation, was not a violation of § 1001. *London* is most easily distinguished by the fact that the attorney never made any fraudlent statement to the court or to the opposing party in any court document or proceeding. The *London* holding seems sound but is vastly different from the case at bar.



The *D'Amato* case is more similar. In a private civil action for damages arising out of the counterfeiting of Johnson Products's "Ultra Sheen" hair gel, D'Amato filed an affidavit denying knowledge that the products he sold were counterfeits. On appeal following a jury conviction for violation of § 1001, the Second Circuit reversed the conviction, holding that § 1001 does not apply to a false statement made in a private civil action. The court said that § 1001 "does not apply where the Government is involved only by way of a court deciding a matter in which the Government or its agencies are not involved." *D'Amato*, 507 F.2d at 28. The court emphasized the fact that the government's only involvement in the case was as adjudicator of the controversy and noted that in other § 1001 cases the government was often involved as an opposing party as well (e.g., false statements made in criminal cases; government as opposing party). *Id.* at 29.

We believe that *D'Amato* is also distinguishable from the case at bar. Without focusing on the distinguishing features, however, we simply hold that to the extent that *D'Amato* is similar enough to be controlling on this issue were this case being heard in the Second Circuit, we decline to follow it in the Sixth Circuit.

We therefore affirm Hubbard's conviction on counts V, VI, and VII.

*3. Mail Fraud Counts (Counts VIII-X)*

Since the 1970s, Hubbard's stepfather had owned a Fino boat. After his stepfather died in 1981, Hubbard took the boat from Florida to St. Clair Shores, Michigan. The boat was in "extremely poor" shape at the time, so Hubbard set out to restore the boat, employing the assistance of one Cliff Hammerlee. Hammerlee stripped down the boat, removing most of the equipment from the boat (e.g., seats, decking, gauges, etc.), and stored the equipment at his own home. When Hubbard did not have the money to pay Hammerlee to continue the restoration, Hubbard rented a truck and picked up the equipment.

In April 1985, Hubbard applied to Allstate for insurance on the boat, claiming its value to be $22,500. Although Allstate denied permanent coverage, it did grant temporary coverage through June 3, 1985. On June 3, Hubbard filed a claim with Allstate for an alleged June 2 theft of equipment from the boat. The Allstate claims adjuster took pictures of the boat, Hubbard sent a letter that itemized the replacement cost for the "stolen" equipment to Allstate on July 12, and Allstate paid a claim of approximately $4800. At trial Hammerlee identified the photos taken by the Allstate adjuster as representative of the boat's condition in 1981 just after he had removed all the equipment for Hubbard. These facts (and specifically the July 12th letter) formed the basis for Count VIII.

Also in April 1985, Hubbard applied for a loan to refurbish the boat. With his loan application, he included fraudulent documentation regarding (1) the boat's value, (2) a prior (non-existent) loan, (3) insurance coverage, and (4) the location of the boat. The loan was approved. By mail on July 31, 1985, Hubbard paid a portion of his loan, made fraudulent representations as to the progress of the restoration, and requested a short-term renewal of the loan. In response to Hubbard's request for a short-term renewal, the bank sent loan renewal documentation to Hubbard on August 29, 1985. The July 31 and August 29 mailings formed the basis of Counts IX and X. The jury found Hubbard guilty on all three mail fraud counts.

Hubbard argues that the evidence was insufficient as to each count of mail fraud because the scheme to defraud was "not dependent upon the charged mailings" and because the scheme had reached fruition before the mailings were made.[7]

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[7]Hubbard also argues that his conviction was barred by the statute of limitations. This argument is without merit because the indictment was returned on July 5, 1990, within five years of the charged mailings.



Hubbard's insufficiency contention fails for two reasons: he misunderstands the required nexus between the scheme and the mailing, and he defines the scheme too narrowly. The scheme charged was not simply a scheme to defraud the insurance company, but was also a scheme to obtain by fraudulent means a loan for repairing a boat and to obtain by fraudulent means an extension of that loan. If the mailings made were "'incident to an essential part of the scheme,' or 'a step in [the] plot,'" *Schmuck v. United States*, 489 U.S. 705, 711 (1989) (citation omitted), liability for mail fraud may attach. Here, the submission of fraudulent documents to the insurance company and the submission of false loan information were obviously important steps in Hubbard's scheme. The third mailing was less integral, but nevertheless sufficient. In response to Hubbard's request for renewal of the loan, the bank sent him loan renewal documents in reliance on his prior misrepresentations. Because Hubbard caused the Bank's mailing by requesting the loan extension documents and because those documents were "a step in the plot," the evidence was sufficient to support the third mail fraud count. We therefore affirm his conviction on counts VIII, IX, and X.

*B. Ineffective Assistance of Counsel*

Finally, Hubbard argues that his trial counsel's deficient performance violated the Sixth Amendment.

Generally, ineffective assistance of counsel allegations will not be addressed on appeal if they have not been raised in the district court. *See United States v. Hill*, 688 F.2d 18 (6th Cir.), *cert. denied*, 459 U.S. 1074 (1982). The exception to this rule is where the record on appeal is adequate to assess the merits of the defendant's allegations. *See United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990). The record here is sufficient to consider this assignment of error, so we may proceed.

In order to show ineffective assistance of counsel, Hubbard must establish two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Hubbard makes a persuasive case for the incompetence of his trial counsel and thus can satisfy the deficiency prong. But such deficiency does not require reversal because in light of the evidence against him and the type of errors committed by his counsel, Hubbard cannot satisfy the prejudice prong; he cannot show that his resulting convictions are unreliable or constitutionally defective. Because there is no reasonable probability that but for his counsel's errors the result of his case would have been different, we reject his ineffective assistance of counsel claim.

## III

For the foregoing reasons, we AFFIRM the district court's judgment of conviction.



DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. Under our circuit-precedent rule, it seems to me that *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967), requires us to reverse defendant Hubbard's conviction on the three counts of the indictment (Counts V through VII) that charged him with having made false statements in violation of 18 U.S.C. §1001.

*Erhardt* involved an indictment with two counts, one of which charged the defendant with perjury (18 U.S.C. §1621) and the other of which charged him with using a false writing in violation of 18 U.S.C. §1001. Only the reversal of the conviction on the §1001 count is directly relevant here.

*Erhardt*'s holding on the §1001 issue was not based primarily on the two-witness rule, as I read the panel's somewhat cryptic opinion. The panel began its discussion of the §1001 issue by saying that "[t]he two-witness rule is not dispositive of appellant's conviction under the count charging the introduction of a false document, since it is generally held that the two-witness rule does not apply to prosecutions under 18 U.S.C. §1001." *Id.* at 175 (citations omitted). It is true that the panel seemed to be talking about its construction of §1001 when it said, at the end of the opinion, that "[a] contrary construction would undermine the effectiveness of the two-witness rule and of the perjury statute itself." *Id.* I do not understand this statement to represent the principal basis for the panel's holding on the §1001 issue, however, given the panel's explicit acknowledgement that the two-witness rule applied only to perjury prosecutions under §1621 and not to false writing prosecutions under §1001.

The principal basis for the holding on the §1001 issue, as I understand it, was the passage from *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963), quoted by the *Erhardt* panel as follows:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include

traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action * * * which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court."

In adopting this statement as the basis for its holding that "§1001 does not apply to the introduction of false documents as evidence in a criminal proceeding," the *Erhardt* panel was saying, I believe, that §1001 does not apply to conduct engaged in by the defendant in connection with the operation of a court's "'judicial' machinery," as opposed to the performance of the court's "'administrative' or 'housekeeping' functions."

If the introduction of false documents in court proceedings is conduct connected with the operation of the court's judicial machinery, and not with the performance of an administrative or housekeeping function, I can see no principled basis for concluding that the making of unsworn false statements in court proceedings is not likewise connected with the operation of the judicial machinery. Accordingly, I respectfully dissent from the affirmance of defendant Hubbard's conviction on the false statement counts of the indictment. I concur in the affirmance of the convictions on the remaining counts.



No. 91-1775
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Filed MAR 30, 1994

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER

JOHN BRUCE HUBBARD,

Defendant-Appellant.

BEFORE: NELSON and BATCHELDER, Circuit Judges; and MATIA*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Nelson would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN, Clerk

* Hon. Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 91-1775

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN BRUCE HUBBARD,

Appellant.

_____/

**PETITION FOR REHEARING**
**AND**
**SUGGESTION FOR REHEARING *EN BANC***

The appellant, through undersigned counsel, respectfully requests that the Court grant rehearing and/or rehearing *en banc* based upon the reasons stated below.

**I.**

**REQUIRED STATEMENT FOR REHEARING *EN BANC***

Counsel for the appellant requests rehearing *en banc* for the following reason:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the United States Court of Appeals



for the Sixth Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions: *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967).

**II.**

**REASON FOR GRANTING REHEARING OR CLARIFICATION**

The appellant seeks rehearing or clarification of the panel's ruling upon the claim of ineffective assistance of counsel. The panel ruled that the appellant presented "a persuasive case for the incompetence of his trial counsel and thus can satisfy the deficiency prong" of the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). Slip opinion at 17. However, the panel concluded that the appellant could not meet the prejudice prong because "he cannot show that his resulting convictions are unreliable or constitutionally defective". *Id*. The appellant requests that the Court rehear or clarify this latter conclusion so that it is not read as barring the appellant from proving prejudice in the district court pursuant to 28 U.S.C. § 2255.

The appellant and his appellate counsel are in possession of the names of defense witnesses and voluminous exculpatory documents available to but never considered by appellant's incompetent trial counsel. The appellant seeks the opportunity to prove that his convictions are unreliable because this compelling evidence was not presented at trial due to trial counsel's ineffectiveness. The appellant was unable to present this evidence on appeal for the obvious reason that the evidence was never presented below and was therefore not in the record.

The appropriate vehicle for consideration of this evidence is a motion to vacate pursuant to 28 U.S.C. § 2255. The

panel's affirmance should be read as "without prejudice" to the appellant's right to obtain § 2255 relief upon an appropriate evidentiary showing even though the issue was raised by the appellant on direct appeal. Prudent appellate counsel must raise on direct appeal ineffective assistance claims or risk a finding of waiver. See *Beaulieu v. United States*, 930 F.2d 805, 807 n.2 (10th Cir.1991) and cases cited. Where appellate counsel acts prudently and raises the issue on direct appeal, the appellate court should not, however, adjudicate the issue against the appellant if the appellant might be entitled to relief upon a proper evidentiary showing. *Id*. Rather, the appellant should be free to pursue relief in the district court. In fact, the general rule, as followed by this circuit, see *United States v. Castro*, 908 F.2d 85, 89 (6th Cir.1990), requires that the issue first be presented to the district court. Application of the general rule assists in the determination of "the asserted prejudicial impact on the outcome of the trial." *Beaulieu*, 930 F.2d at 805 (citing *Castro*).

For these reasons, the appellant respectfully requests that the Court grant rehearing or clarification to indicate that the affirmance is without prejudice to the appellant's rights pursuant to 18 U.S.C. § 2255.

## III.

## REASONS FOR GRANTING REHEARING *EN BANC*

In his dissenting opinion in this case, Judge Nelson concluded that the majority opinion is in conflict with *United States v. Erhardt*, 381 F.2d 173 (6th Cir.1967) and that the correct application of *Erhardt* requires reversal of the appellant's convictions on Counts V through VII. Based upon the conflict between the panel's decision and *Erhardt* and because the panel has effectively overruled its own binding



precedent, the appellant seeks rehearing *en banc*.

In *Erhardt*, this Court reversed a § 1001 conviction where the defendant had submitted false sworn testimony and a false writing in an earlier criminal proceeding against him. This Court reasoned as follows: "We hold that appellant's conviction under § 1001 must be reversed ... because § 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding." *Id*. at 175.

In the case at bar, the appellant was convicted of violating § 1001 for having submitted unsworn false statements in earlier Court proceedings. On appeal, the facts appeared even more compelling for reversal than those presented in *Erhardt* where, by contrast, the false statements were sworn. Nevertheless, the panel declined to apply *Erhardt*, ruling instead that the decision's "foundation has been significantly weakened, if not entirely undercut, by the abolition of the two-witness rule in perjury prosecutions, the vitality of which was a primary concern in *Erhardt*." Slip opinion at 12. In so holding, the panel has rendered an opinion not only in conflict with *Erhardt*, but has effectively overruled *Erhardt*.

In taking issue with the panel's failure to follow *Erhardt*, Judge Nelson concluded that reversal was required "[u]nder our circuit-precedent rule". Slip opinion at 18. Judge Nelson further found that the panel's attack upon the vitality of *Erhardt* was wrong for the following reasons:

> *Erhardt*'s holding on the § 1001 issue was NOT based primarily on the two-witness rule, as I read the panel's somewhat cryptic opinion. The panel [in Erhardt] began its discussion of the § 1001 issue by saying that "[t]he two-witness rule is NOT dispositive of appellant's conviction under the court charging the introduction of a false document, since it is generally held that the two-

witness rule does not apply to prosecutions under 18 U.S.C. § 1001." *Id*. at 175. (emphasis supplied)

Slip opinion at 18. Judge Nelson concluded that the principal basis for this Court's ruling in *Erhardt* on the § 1001 issue was *Morgan v. United States*, 309 F.2d 234, 237 (D.C.Cir.1962), *cert. denied*, 373 U.S. 917 (1963), cited in *Erhardt* for the proposition that § 1001 does not include traditional trial tactics and applies only to the type of action characterized as "administrative" or "housekeeping" functions as opposed to the "judicial" machinery of the court. *Id*. at 19. Continued reliance upon this analysis, Judge Nelson reasoned, compelled reversal for the following reason:

> If the introduction of false documents in court proceedings is conduct connected with the operation of the court's judicial machinery, and not with the performance of an administrative or housekeeping function, I can see no principled basis for concluding that the making of unsworn false statements in court proceedings is not likewise connected with the operation of the judicial machinery.

*Id*.

Based upon the reasoning of Judge Nelson and in order to maintain uniformity and to preserve the circuit-precedent rule, *en banc* rehearing is sought.

## IV.

## CONCLUSION

The panel has ruled that the appellant's trial counsel was deficient. Voluminous evidence is available which would satisfy the prejudice prong of the *Strickland* test for an



ineffective assistance of counsel claim. The Court is requested to rule on rehearing that its affirmance was without prejudice to the appellant's rights under 28 U.S.C. § 2255.

Rehearing *en banc* is warranted because the majority has overruled binding Sixth Circuit precedent. Only the *en banc* Court or the Supreme Court can so rule. Due to the violation of the circuit-precedent rule and because the panel decision is in conflict with the binding precedent, *en banc* review is respectfully requested.

WHEREFORE, the appellant respectfully requests that the Court rehear or clarify the ineffective assistance claim with regard to the appellant's right to seek relief under 28 U.S.C. § 2255 and grant rehearing *en banc* to resolve the conflict with *Erhardt* and the Court's circuit-precedent rule.

Respectfully submitted,

LAW OFFICES OF PAUL MORRIS, P.A.
2600 Douglas Road
Penthouse II
Coral Gables, FL 33134
(305) 446-2020
/s/ PAUL MORRIS
Counsel for Appellant

I HEREBY CERTIFY that a copy of the foregoing was mailed to Jenifer Peregord, Assistant United States Attorney, Office of the United States Attorney, 817 Federal Building, Detroit, Michigan 48226 this 28th day of February, 1994.

/s/ PAUL MORRIS

## AFFIDAVIT

Before me, the undersigned authority, personally appeared DAVID H. RAAFLAUB, who first being duly sworn, stated the following:

1. I [David H. Raaflaub] am a sole practitioner with law offices at 400 West Washington Street, Suite 7, Ann Arbor, Michigan 48103.
2. I was trial counsel for the defendant in United States v. John Bruce Hubbard, United States District Court, Eastern District of Michigan, Southern Division, Criminal No. 89-80747.
3. The trial was the first federal jury trial in which I was counsel for a party.
4. I had no prior experience in criminal federal litigation.
5. I did not review all of the discovery made available by the Office of the United States Attorney.
6. I did not interview all of the potential defense witnesses.
7. I failed to object to various comments made and procedures undertaken by the presiding judge.
8. I believe that the defendant was afforded ineffective assistance of counsel.

/s/ DAVID H. RAAFLAUB

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED AUTHORITY THIS ___ DAY OF ___, 1991.

[redacted]

---

JOHN BRUCE HUBBARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

**REPLY FOR THE UNITED STATES**

---


[redacted]
*Solicitor General*

[redacted]
*Assistant Attorney General*

[redacted]
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*


---

## QUESTIONS PRESENTED

1. Whether petitioner's convictions under 18 U.S.C. 1001 for knowingly making false statements in pleadings filed with the bankruptcy court are barred by the so-called "judicial function" exception to Section 1001.

2. Whether petitioner's convictions under 18 U.S.C. 1001 are barred by the "exculpatory no" doctrine.

3. Whether the court of appeals erred in rejecting petitioner's claim of ineffective assistance of counsel without remanding the case to the district court for an evidentiary hearing.

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JOHN BRUCE HUBBARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 16 F.3d 694.

### JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. A petition for rehearing was denied on March 30, 1994. Pet. App. 20. On May 10, 1994, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 1994. The petition for a writ of certiorari was filed on July 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of bankruptcy fraud (Counts 1-4), in violation of 18 U.S.C. 152; three counts of making false statements in a matter within the jurisdiction of a federal department (Counts 5-7), in violation of 18 U.S.C. 1001; and three counts of mail fraud (Counts 8-10), in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of 24 months' imprison-ment on Counts 1 through 9, and to a consecutive term of five years' probation on Count 10. The court of appeals affirmed.

1. On September 25, 1985, petitioner filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In connection with the ensuing bankruptcy proceedings, the trustee filed an amended complaint against petitioner, after being informed that petitioner had failed to disclose certain property that he owned or possessed. Pet. App. 2; Gov't C.A. Br. 13. Among other things, the amended complaint alleged that a well-drilling machine was stored at petitioner's residence and that parts to the machine were stored in a nearby warehouse. *Id.* at 15. Petitioner responded in a formal pleading, entitled "Debtor's Answer to Trustee's First Amended Complaint," denying each allegation "for the reason [that] it is untrue." *Ibid.*; Pet. App. 4.

The trustee filed, in addition, a motion to compel petitioner to surrender the books and records of his businesses, Pet. App. 2, alleging that "despite requests of the Trustee, the Debtor has refused to surrender all books, documents, records and papers relating to property of the Estate to the Trustee," Gov't C.A. Br. 14. Petitioner filed a response, denying the allegation and



asserting that he had produced the requested documents to a previous bankruptcy trustee. Pet. App. 4; Gov't C.A. Br. 14.

2. On July 5, 1990, petitioner was charged by a grand jury with bankruptcy fraud, mail fraud, and making false statements in a matter within the jurisdiction of the federal bankruptcy court. Pet. App. 2. The false statement counts were based on the statements made by petitioner in his response to the bankruptcy trustee's motion to compel and in his answer to the trustee's amended complaint. *Id.* at 4. The evidence at trial showed that when petitioner filed his answer, he knew that the well-drilling machine and machine parts were stored at the locations specified in the amended complaint. Gov't C.A. Br. 15-16. In addition, the evidence demonstrated that petitioner had not produced the requested books and records to either the original or the successor trustee. *Id.* at 14-15. The jury convicted petitioner on all counts of the indictment. Pet. App. 2.

3. On appeal, petitioner argued that he was improperly convicted under 18 U.S.C. 1001 because his false statements fell within "exculpatory no" and "judicial function" exceptions to that statute. The court of appeals dismissed petitioner's "exculpatory no" argument based on the court's prior decision in *United States* v. *Steele*, 933 F.2d 1313, 1319-1322 (6th Cir.) (en banc), cert. denied, 112 S. Ct. 303 (1991). Pet. App. 6.

Turning to the so-called "judicial function" exception, the court noted that several courts of appeals have held that Section 1001 can be violated by false statements made in connection with "administrative matters of the courts, but not the judicial functions of those courts." Pet. App. 9-10 (citing cases). After analyzing the origins of and stated rationale for the exception, the court declined to adopt it. Noting that there is no basis in the

text or legislative history of Section 1001 for limiting the statute in that fashion, the court concluded that "the judicial function exception does not rest on solid legal ground." *Id.* at 13; see also *id.* at 11 n.5.

Petitioner also claimed that his trial counsel's performance was so deficient that it denied him effective assistance of counsel. At the outset, the court of appeals noted that it would address on direct appeal an ineffective assistance of counsel claim that was not raised in the district court only where "the record on appeal is adequate to assess the merits of the defendant's allegations." Pet. App. 16. Here, the court stated, the record was sufficient to permit it to consider petitioner's claim. *Ibid.* On the merits, the court found that petitioner made "a persuasive case for the incompetence of his trial counsel." *Id.* at 17. The court concluded, however, that reversal was not warranted, because "in light of the evidence against [petitioner] and the type of errors committed by his counsel," there was "no reasonable probability that but for his counsel's errors the result of his case would have been different." *Ibid.*

Judge Nelson dissented on the "judicial function" exception issue. Pet. App. 18-19. In his view, the circuit had held broadly in *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967) (per curiam), that Section 1001 "does not apply to conduct engaged in by the defendant in connection with the operation of a court's judicial machinery." Pet. App. 19 (internal quotation marks omitted). Because petitioner's false statements were made in an adjudicative context, Judge Nelson believed that *Erhardt* controlled and precluded petitioner's conviction.



## ARGUMENT

1. Petitioner contends (Pet. 15-16) that this Court should grant review to resolve a conflict among the circuits as to whether 18 U.S.C. 1001 applies to statements made in matters within the jurisdiction of the Judicial Branch that implicate a court's judicial function. We believe that the Sixth Circuit was correct in refusing to adopt any such "judicial function" exception to Section 1001. We recognize, however, that several courts of appeals have adopted some form of "judicial function" exception,[1] although other courts have expressed doubts as to its validity.[2] In light of the conflict among the circuits as to the construction of this important federal statute, we agree that the issue merits this Court's review.

a. Section 1001 provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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[1] See *United States* v. *Masterpol*, 940 F.2d 760 (2d Cir. 1991); *United States* v. *Holmes*, 840 F.2d 246 (4th Cir.), cert. denied, 488 U.S. 831 (1988); *United States* v. *Abrahams*, 604 F.2d 386 (5th Cir. 1979); *United States* v. *Mayer*, 775 F.2d 1387 (9th Cir. 1985); *United States* v. *Wood*, 6 F.3d 692 (10th Cir. 1993).

[2] See *United States* v. *Barber*, 881 F.2d 345, 350 (7th Cir. 1989), cert. denied, 495 U.S. 922 (1990); *United States* v. *Poindexter*, 951 F.2d 369, 387 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 656 (1992).

The so-called "judicial function" exception to Section 1001 originated in dictum from *Morgan* v. *United States*, 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963). In *Morgan*, the District of Columbia Circuit upheld the conviction under Section 1001 of a layman who had falsely held himself out as an attorney in various court proceedings. The defendant argued on appeal against application of the statute to statements made within the jurisdiction of the Judicial Branch, contending that such application would criminalize traditional trial tactics. He claimed, for example, that the statute's false statement proscription would make a criminal offense out of a plea of "not guilty" or a lawyer's summation on behalf of a guilty client. 309 F.2d at 237. Responding to that concern, the court of appeals noted its belief that "neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'" *Ibid.* The statute's application to "traditional trial tactics" was not presented in the *Morgan* case, however, as the court held "only * * * that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court." *Ibid.*[3]

Since *Morgan*, courts have extended the "judicial function" exception beyond traditional trial tactics to

[3] The District of Columbia Circuit has since distanced itself from *Morgan*'s dictum, expressing "doubt that the 'traditional trial tactics' rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding." *United States* v. *Poindexter*, 951 F.2d at 387 (refusing to create a parallel "legislative function" exception to the statute).



apply to knowing lies made to a court whenever the court is performing an adjudicative function. Courts recognizing the exception have, for instance, reversed the Section 1001 convictions of a defendant who knowingly provided false information to FBI agents in the course of a grand jury investigation, *United States* v. *Wood*, 6 F.3d 692, 694-695 (10th Cir. 1993), a defendant who lied to a magistrate judge about his aliases and his arrest record at a bail hearing, *United States* v. *Abrahams*, 604 F.2d 386, 393-394 (5th Cir. 1979), and a defendant who submitted wholly fictitious letters of recommendation to a sentencing court, *United States* v. *Mayer*, 775 F.2d 1387, 1391-1392 (9th Cir. 1985). At the same time, the courts that have recognized the "judicial function" exception have applied it only to false statements made in the course of courts' adjudicative functions, and not when made in the course of the courts' performance of administrative functions, even though the distinction between those functions has often proved elusive. Compare, *e.g.*, *United States* v. *Holmes*, 840 F.2d 246, 248-249 (4th Cir.) (false statements regarding identity made to magistrate judge at plea hearing fall within the court's administrative sphere), cert. denied, 488 U.S. 831 (1988) with *United States* v. *Abrahams*, 604 F.2d at 393 (false statements regarding identity made to magistrate judge at bail hearing fall within "judicial function" exception). The courts have disagreed on whether the exception applies to false statements by nonparties, compare *United States* v. *Wood*, 6 F.3d at 695 (exception shields false statement by potential witness) with *United States* v. *Barber*, 881 F.2d 345, 350 (7th Cir. 1989) (to the extent exception is valid, it would not shield false statements made to sentencing judge in another defendant's case), cert. denied, 495 U.S. 922 (1990). And while the exception has not been applied to statements made outside of the

confines of the Judicial Branch, *e.g.*, *Stein* v. *United States*, 363 F.2d 587, 589-590 (5th Cir.) (applying Section 1001 to false statements made to the Tax Court), cert. denied, 385 U.S. 934 (1966), it has been suggested that the rationale for the exception applies equally to statements made in the context of agency adjudicative proceedings. *United States* v. *Mayer*, 775 F.2d at 1390 n.2.

b. The "judicial function" exception, together with its qualifications and limitations, finds no grounding in the language of Section 1001. This Court has explained that the term "department," as it is used within the statute, encompasses the Executive, Legislative, and Judicial Branches. *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955). The plain text of the statute reaches any false statement "in any matter within the jurisdiction of any department." That broad language does not create or permit distinctions based on the functional nature of the "matter" at issue. Indeed, no court that has adopted the "judicial function" exception has attempted to square the exception with the statutory text.

Nor can the "judicial function" exception be justified as necessary to protect legitimate trial prerogatives. The application of criminal penalties to intentional false statements neither impairs the presumption of innocence nor inhibits legitimate advocacy. Contrary to the defendant's suggestion in *Morgan*, a plea of "not guilty" could not come within the purview of the statute, because it is not a statement of fact, but rather a formal notice of nonacquiescence. And defense counsel may forcefully attack the probity of the government's evidence and challenge the government's failure to prove guilt beyond a reasonable doubt without resort to knowing falsification. Like the Sixth Circuit, we do not



believe that a prohibition on lying to the court constitutes an undue restriction of trial tactics.[4]

In *United States* v. *Rodgers*, 466 U.S. 475 (1984), this Court recognized that several courts of appeals had adopted a "judicial function" exception to Section 1001. *Id.* at 483 n.4. Because the exception was not at issue in *Rodgers*, the Court "express[ed] no opinion on the validity of [that] line of cases." *Ibid.* The Sixth Circuit's rejection of the "judicial function" exception has now created a conflict among the circuits on the issue. Particularly in view of the further conflicts and confusion generated by the courts' attempts to delineate the scope of the judge-made exception, we believe that the question of its core legitimacy warrants this Court's review.

2. Petitioner also argues (Pet. 17) that the Court should grant review to resolve a conflict among the circuits concerning the validity of the so-called "exculpatory no" exception to Section 1001. Courts that have adopted that exception have held that Section 1001 does not apply to simple denials of guilt by the target of a government investigation. See *United States* v. *Moore*, 27 F.3d 969, 978 & n.6 (4th Cir. 1994) (citing cases from the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that have adopted the "exculpatory no" doctrine in some form). Along with the Sixth Circuit, the Fifth Circuit has rejected the "exculpatory no" exception as inconsistent with the plain language of Section 1001. See *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1045 (5th Cir. 1994) (en banc).

---

[4] See Pet. App. 4 n.3 ("[W]hether or not it is a 'traditional trial tactic' to answer a complaint with affirmative falsehoods, we need not sanction such action and therefore will not create an exception so broad as to include [petitioner's] conduct.").

The disagreement among the circuits about the existence of an "exculpatory no" exception to Section 1001 may warrant review in an appropriate case. This case is not well suited to that task, however, because the facts of this case would not call for application of the "exculpatory no" doctrine under the law of any circuit.

Most cases applying the "exculpatory no" doctrine have involved direct interrogation by law enforcement authorities in the course of a criminal investigation. See, *e.g.*, *United States* v. *Equihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988) (post-arrest questioning); *United States* v. *Cogdell*, 844 F.2d 179 (4th Cir. 1988) (questioning by Secret Service agent investigating fraudulent application for replacement tax refund check). The remaining cases have involved questions intended to uncover potential criminal violations. See, *e.g.*, *United States* v. *Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978) (defendant falsely denied he was carrying more than $5,000 in response to question at border checkpoint); *United States* v. *Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982) (defendant falsely denied on tax return that he had foreign bank accounts; purpose of question on tax return was to uncover activity "linked to criminal activity in the United States"), cert. denied, 461 U.S. 927 (1983).

The false statements at issue in this case, by contrast, were made in response to a bankruptcy trustee's attempts to account for and collect the assets of the estate. See Pet. App. 2, 4; 11 U.S.C. 704. Not only were the trustee's queries not propounded in the course or contemplation of a criminal prosecution, they were not government questions at all. The trustee was the representative of the estate, 11 U.S.C. 323(a), not the representative of a governmental entity, and certainly not the representative of a criminal investigative entity.



Moreover, while the "exculpatory no" doctrine is concerned with "respons[es] to inquiries initiated by [the government]," *United States* v. *Cogdell*, 844 F.2d at 183, in this case it was petitioner who initiated the dialogue. Petitioner voluntarily filed for Chapter 7 protection, and his false pleadings were filed in an attempt to conceal his assets from the trustee and the court. Cf. *United States* v. *Moore*, 27 F.3d at 979 ("exculpatory no" doctrine "does not extend to misleading exculpatory stories or affirmative misstatements").

3. Finally, petitioner contends (Pet. 18-22) that the court of appeals erred in rejecting his ineffective assistance of counsel claim on the ground that he could not show that he was prejudiced by his trial counsel's sub-par performance. Petitioner claims that the court should have afforded him an opportunity to prove prejudice in the district court in a proceeding under 28 U.S.C. 2255. That contention is without merit. In his brief to the court of appeals, petitioner asserted that the trial record was adequate to support his claim that he was prejudiced by his counsel's deficient performance. He stated, without equivocation: "[T]here is no need for a post-conviction proceeding under 28 U.S.C. § 2255." Pet. C.A. Br. 34, 47. Having raised his ineffective assistance of counsel claim in the court of appeals, petitioner cannot fault the court for having ruled on it.

## CONCLUSION

The petition for a writ of certiorari should be granted as to Question 1. In all other respects, the petition should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

JO ANN HARRIS
*Assistant Attorney General*

NINA GOODMAN
*Attorney*

OCTOBER 1994

No. 94-172 (3)



In The

# Supreme Court of the United States

OCTOBER TERM, 1994

JOHN BRUCE HUBBARD,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JULY 27, 1994**
**CERTIORARI GRANTED OCTOBER 31, 1994**

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## RELEVANT DOCKET ENTRIES

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| 6/24/86 | Motion for Ex Parte Order Requiring Debtor to Surrender All Books, Documents, Records and Papers Relating to Property of the Estate and Order to Show Cause Why Debtor Should Not Be Held in Contempt of Court |
| 8/4/86 | Answer to Trustee's Motion for Ex-Parte Order Requiring Debtor to Surrender All Books, Documents, Records and Papers Relating to Property of the Estate and Order to Show Cause Why Debtor Should Not Be Held in Contempt of Court |
| 8/11/86 | Debtor's Answer to Trustee's First Amended Complaint |
| 7/9/90 | Indictment |
| 1/10, 30, 31/91 | Transcripts of Trial Proceedings |
| 2/1, 4-7, 8, 10-12/91 | Transcripts of Trial Proceedings |
| 6/18/91 | Transcript of Trial Proceedings |

*Relevant Docket Entries*

| | |
|---|---|
| 6/20/91 | Judgment of District Court |
| 6/24/91 | Notice of Appeal |
| 2/15/94 | Decision of the Sixth Circuit in United States v. Hubbard |
| 2/28/94 | Petition for Rehearing and Suggestion for Rehearing En Banc |
| 3/30/94 | Order Denying Rehearing |



**FIRST AMENDED COMPLAINT OF TRUSTEE (EXCERPT, ¶¶ 10-13), UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JULY 24, 1986**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 85-03249-R
Chapter 7
Hon. Steven Rhodes

IN THE MATTER OF:

JOHN BRUCE HUBBARD, a/k/a BRUCE WELKER-HUBBARD, a/k/a JOHN BRUCE WELKER-HUBBARD,

Debtor.

---

Case No. 85-1120-R

LAWRENCE R. VANTIL, and J.K. FELT,

Plaintiffs,

-vs-

JOHN BRUCE HUBBARD, a/k/a/ BRUCE WELKER-HUBBARD and KATHLEEN HUBBARD,

Defendants.

---

Adversary No. 85-1341-R

ROBERT S. HERTZBERG, Trustee,

Plaintiff,

*First Amended Complaint*

-vs-

JOHN BRUCE HUBBARD, a/k/a BRUCE WELKER-HUBBARD, a/k/a JOHN BRUCE WELKER-HUBBARD, KATHLEEN HUBBARD, CHESTER KACZMAREK, MARY JANE HUBBARD, HUBBARD ASSOCIATES, JOHN LAUVE, and JOHNNY TRUPIANO,

Defendants.

FIRST AMENDED COMPLAINT

NOW COMES Robert S. Hertzberg, by and through his attorneys, Hertzberg & Golden, P.C. and for his First Amended Complaint, states unto this Honorable Court as follows:

* * *

10. Upon information and belief, the well-drilling machine was stored at property located at 900 Lakeshore, Grosse Pointe Shores, Michigan.

11. The Trustee has been unable to ascertain the present location of the well-drilling machine, however, said asset should be included within the Estate and turned over to the Trustee.

12. Upon information and belief, the Debtor possesses, uses and/or controls drill bits and drilling mechanisms, which items of property the Debtor has failed to report to the Trustee.

13. Upon information and belief, the drill bits and drilling mechanism were at one time being stored in a warehouse at a mushroom farm on Dequindre Road in Rochester, Michigan.

* * *



**TRUSTEE'S MOTION FOR EX PARTE ORDER REQUIRING DEBTOR TO SURRENDER ALL BOOKS, DOCUMENTS, RECORDS AND PAPERS RELATING TO PROPERTY OF THE ESTATE AND ORDER TO SHOW CAUSE WHY DEBTOR SHOULD NOT BE HELD IN CONTEMPT OF COURT, UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JULY 24, 1986**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 85-03249-R
Chapter 7
Hon. Steven Rhodes

IN THE MATTER OF:

JOHN BRUCE HUBBARD, a/k/a BRUCE WELKER-HUBBARD, a/k/a JOHN BRUCE WEXLER-HUBBARD,

Debtor.

---

Case No. 85-1120-R

LAWRENCE R. VANTIL, and J.K. FELT,

Plaintiffs,

-vs-

JOHN BRUCE HUBBARD, a/k/a/ BRUCE WELKER-HUBBARD and KATHLEEN HUBBARD,

Defendants.

Adversary No. 85-1341-R

ROBERT S. HERTZBERG, Trustee,

Plaintiff,

-vs-

JOHN BRUCE HUBBARD, a/k/a BRUCE WELKER-HUBBARD, a/k/a JOHN BRUCE WELKER-HUBBARD, KATHLEEN HUBBARD, CHESTER KACZMAREK, MARY JANE HUBBARD, HUBBARD ASSOCIATES, JOHN LAUVE, and JOHNNY TRUPIANO,

Defendants.

**MOTION FOR EX-PARTE ORDER REQUIRING DEBTOR TO SURRENDER ALL BOOKS, DOCUMENTS, RECORDS AND PAPERS RELATING TO PROPERTY OF THE ESTATE AND ORDER TO SHOW CAUSE WHY DEBTOR SHOULD NOT BE HELD IN CONTEMPT OF COURT**

NOW COMES the Trustee, Robert S. Hertzberg, by and through his attorneys, Hertzberg & Golden, P.C. and states unto this Honorable Court as follows:

1. That he is the duly appointed and serving Trustee pursuant to Order of this Court.

2. That the Debtor filed his petition for Bankruptcy on September 25, 1986.

3. That despite requests of the Trustee, the Debtor has



refused to surrender all books, documents, records and papers relating to property of the Estate to the Trustee.

4. It is absolutely necessary that the Trustee be able to discover and review all of the books and records and other papers relating to the property of the Estate.

WHEREFORE, the Trustee requests this Honorable Court to grant an Ex-Parte Order requiring the Debtor to surrender all books, documents, records and papers relating to the property of the Estate of the Trustee. In addition, the Trustee prays that this Honorable Court enter an Order Compelling the Appearance of the Debtor, to show cause, if any there be, why the Debtor should not be held in contempt of Court for failure to surrender all the books, documents, records and papers relating to property of the Estate.

Respectfully Submitted,

HERTZBERG & GOLDEN, P.C.

By: s/ Steven T. Miller
Steven T. Miller (P36846)
344 N. Woodward Avenue
Second Floor
Birmingham, MI 48011
(313) 540-8282

Dated: July 24, 1986

**ANSWER [OF PETITIONER] TO TRUSTEE'S MOTION FOR EX PARTE ORDER REQUIRING DEBTOR TO SURRENDER ALL BOOKS, DOCUMENTS, RECORDS AND PAPERS RELATING TO PROPERTY OF THE ESTATE AND ORDER TO SHOW CAUSE WHY DEBTOR SHOULD NOT BE HELD IN CONTEMPT OF COURT (EXCERPT, ¶¶ 1-3), UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED AUGUST 4, 1986**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BANKRUPTCY COURT

Case No. 85-03249-R
Hon. Steven Rhodes
Chapter 7

IN RE:

JOHN BRUCE HUBBARD, a/k/a Bruce Welker-Hubbard, a/k/a John Bruce Welker Hubbard,

Debtor.

---

Case No. 85-1120-R
Adversary Proceeding

LAWRENCE R. VAN TIL and J. KAY Felt,

Plaintiffs,

v

JOHN BRUCE HUBBARD,

Defendant.



*Answer to Motion*

Case No. 85-1341-R
Adversary Proceeding

Robert S. Hertzberg, Trustee,

Plaintiff,

v

John Bruce Hubbard, a/k/a BRUCE WELKER-HUBBARD, a/ka JOHN BRUCE WELKER-HUBBARD, KATHLEEN HUBBARD, CHESTER KACZMAREK, MARY JANE HUBBARD, HUBBARD ASSOCIATES, JOHN LAUVE, and JOHNNY TRUPIANO,

Defendants.

**ANSWER TO TRUSTEE'S MOTION FOR EX-PARTE ORDER REQUIRING DEBTOR TO SURRENDER ALL BOOKS, OF THE ESTATE AND ORDER TO SHOW CAUSE WHY DEBTOR SHOULD NOT BE HELD IN CONTEMPT OF COURT**

NOW COMES the Debtor, John Bruce Hubbard, in the above captioned action, by and through his attorneys, Gase, Williams, Howell, and for his Answer to Trustee's Motion says as follows:

1. That in Answer to the allegations contained in Paragraph One of Trustee's Motion, Debtor neither admits nor denies that he is duly appointed and serving. Debtor further states that Debtor, on information and belief, believes that Robert S. Hertzberg is serving as a successor trustee in this matter.

2. That in Answer to the allegations contained in Paragraph

*Answer to Motion*

Two of Trustee's Motion, Debtor denies same for the reason it is untrue. Debtor further states that Debtor filed a Petition for relief under Chapter 11 on September 25, 1985.

3. That in Answer to the allegations contained in Paragraph Three of Trustee's Motion, Debtor denies same for the reason it is untrue. Debtor further states that the original trustee requested records, books, and documents which were delivered to her place of business and from which she photocopied many documents and surrendered the balance of the documents to the Debtor. Debtor further states that at no time has the Trustee nor his agents contacted Debtor or Debtor's attorney and requested the materials alleged to herein.

* * *



**DEBTOR'S [PETITIONER'S] ANSWER TO TRUSTEE'S FIRST AMENDED COMPLAINT (EXCERPT, ¶¶ 10, 13), UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED AUGUST 11, 1986**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BANKRUPTCY COURT

Case No. 85-03249-R
HON. STEVEN RHODES
Chapter 7

IN RE:

JOHN BRUCE HUBBARD, a/k/a BRUCE WELKER-HUBBARD, a/k/a JOHN BRUCE WELKER HUBBARD,

Debtor.

---

Case No. 85-1120-R
Adversary Proceeding

LAWRENCE R. VAN TIL and J. KAY Felt,

Plaintiffs,

v

JOHN BRUCE HUBBARD,

Defendant.

---

Case No. 85-1341-R
Adversary Proceeding

ROBERT S. HERTZBERG, Trustee,

Plaintiff,

v

JOHN BRUCE HUBBARD, a/k/a BRUCE WELKER-HUBBARD, a/k/a JOHN BRUCE WELKER-HUBBARD, KATHLEEN HUBBARD, CHESTER KACZMAREK, MARY JANE HUBBARD, HUBBARD ASSOCIATES, JOHN LAUVE, and JOHNNY TRUPIANO,

Defendants.

DEBTOR'S ANSWER TO TRUSTEE'S FIRST AMENDED COMPLAINT

NOW COMES the Debtor, John Bruce Hubbard, in the above captioned action, by and through his attorneys, Gase, Williams & Howell, and for his Answer to Trustee's First Amended Complaint says as follows:

* * *

10. That in Answer to the allegations contained in Paragraph Ten of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue.

* * *

13. That in Answer to the allegations contained in Paragraph Thirteen of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue.

* * *



**INDICTMENT, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION (EXCERPT, COUNTS 5-7), FILED JULY 5, 1990**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL NO. 89-80747

HON. GEORGE LA PLATA

VIO: 18 U.S.C. 152
18 U.S.C. 1001
18 U.S.C. 1341

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN BRUCE HUBBARD,

Defendant.

INDICTMENT

THE GRAND JURY CHARGES:

* * *

## COUNT FIVE
## (18 U.S.C. §1001, 2(b) - CAUSING A FALSE AND FRAUDULENT STATEMENT IN A MATTER WITHIN A DEPARTMENT OF THE UNITED STATES)

That on or about August 4, 1986, in the Eastern District of Michigan, Southern Division, John Bruce Hubbard, defendant herein, in a matter within the jurisdiction of a department of the United States, to wit; the United States Bankruptcy Court for the Eastern District of Michigan, did knowingly and willfully cause a false and fraudulent statement of a material fact in his motion response entitled: "ANSWER TO TRUSTEE'S MOTION FOR EX-PARTE ORDER REQUIRING DEBTOR TO SURRENDER ALL BOOKS, DOCUMENTS, RECORDS AND PAPERS RELATING TO PROPERTY OF THE ESTATE AND ORDER TO SHOW CAUSE WHY DEBTOR SHOULD NOT BE HELD IN CONTEMPT OF COURT," filed in said department of the United States, with regards to United States Bankruptcy Case No. 85-03249-R, Adversary Proceeding Case No. 85-1341-R, Eastern District of Michigan. Said false and fraudulent statement consisted of the defendant's false pleading response to question number 3 of the Trustee's motion entitled: "MOTION FOR EX-PARTE ORDER REQUIRING DEBTOR TO SURRENDER ALL BOOKS, DOCUMENTS, RECORDS AND PAPERS RELATING TO PROPERTY OF THE ESTATE AND ORDER TO SHOW CAUSE WHY DEBTOR SHOULD NOT BE HELD IN CONTEMPT OF COURT," filed July 24, 1986, in said bankruptcy case, wherein the Trustee stated "That despite requests of the Trustee, the Debtor has refused to surrender all books, documents, records and papers relating to property of the Estate to the Trustee," and the defendant in his responsive pleading caused the following answer: "That in Answer to the allegations contained in Paragraph Three of Trustee's Motion, Debtor denies same for the reason it is untrue. Debtor further



states that the original trustee requested records, books, and documents which were delivered to her place of business and from which she photocopied many documents and surrendered the balance of the documents to the Debtor. Debtor further states that at no time has the Trustee nor his agents contacted Debtor or Debtor's attorney and requested the materials alleged to herein." Said answer is false and fraudulent at least with regards to that portion of the answer stating that documents were delivered to the place of business of the original Trustee, she photocopied many and surrendered the balance to the debtor, all in violation of 18 U.S.C. Section 1001 and 18 U.S.C. Section 2(b).

## COUNT SIX
## (18 U.S.C. §1001, 2(b) - CAUSING A FALSE AND FRAUDULENT STATEMENT IN A MATTER WITHIN A DEPARTMENT OF THE UNITED STATES)

That on or about August 11, 1986, in the Eastern District of Michigan, Southern Division, JOHN BRUCE HUBBARD, defendant herein, in a matter within the jurisdiction of a department of the United States, to wit; the United States Bankruptcy Court for the Eastern District of Michigan, did knowingly and willfully cause a false and fraudulent statement of a material fact in his motion response entitled "DEBTOR'S ANSWER TO TRUSTEE'S FIRST AMENDED COMPLAINT," filed in said department of the United States with regards to United States Bankruptcy Case No. 85-03249-R, Adversary Proceeding Case No. 85-1341-R, Eastern District of Michigan, said false and fraudulent statement consisted of the defendant's false pleading response to question number 10 of the Trustee's pleading entitled "First Amended Complaint," filed July 24, 1986, in said bankruptcy case, wherein the Trustee stated "Upon information and belief, the well-drilling machine was stored at

property located at 900 Lakeshore, Grosse Pointe Shores, Michigan," and the defendant in his responsive pleading caused the following false and fraudulent answer: "That in Answer to the allegations contained in Paragraph Ten of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue," all in violation of 18 U.S.C. Section 1001 and 18 U.S.C. Section 2(b).

**COUNT SEVEN**
**(18 U.S.C. §1001, 2(b) - CAUSING A FALSE AND FRAUDULENT STATEMENT IN A MATTER WITHIN A DEPARTMENT OF THE UNITED STATES)**

That on or about August 11, 1986, in the Eastern District of Michigan, Southern Division, JOHN BRUCE HUBBARD, defendant herein, in a matter within the jurisdiction of a department of the United States, to wit; the United States Bankruptcy Court for the Eastern District of Michigan, did knowingly and willfully cause a false and fraudulent statement of a material fact in his motion response entitled "DEBTOR'S ANSWER TO TRUSTEE'S FIRST AMENDED COMPLAINT," filed in said department of the United States, with regards to United States Bankruptcy Case No. 85-03249-R, Adversary Proceeding Case No. 85-1341-R, Eastern District of Michigan. Said false and fraudulent statement consisted of the defendant's false pleading response to question number 13 of the Trustee's pleading entitled: "First Amended Complaint," filed July 24, 1986, in said bankruptcy case, wherein the Trustee stated "Upon information and belief, the drill bits and drilling mechanism were at one time being stored in a warehouse at a mushroom farm on Dequindre Road in Rochester, Michigan," and the defendant in his responsive pleading caused the following false and fraudulent answer: "That in Answer to the allegations contained in Paragraph Thirteen of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue," all in violation of 18 U.S.C. Section 1001 and 18 U.S.C. Section 2(b).

No. 94-172

In The

# Supreme Court of the United States

October Term, 1994

JOHN BRUCE HUBBARD,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether the petitioner's convictions under 18 U.S.C. § 1001 for knowingly making false statements in documents filed with the bankruptcy court are barred by the so-called "judicial function" exception to § 1001.

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## OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-19) is reported at 16 F.3d 694.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1994. A timely-filed petition for rehearing (Pet. App. 21-26) was denied on March 30, 1994. (Pet. App. 20). On May 10, 1994, Justice Stevens extended the time within which to file a petition for a writ of certiorari to July 28, 1994. The petition for a writ of certiorari was filed on July 27, 1994 and granted on October 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 6 provides as follows:

> The term "department" means one of the executive departments enumerated in section 1 [now section 101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

Title 18, Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

In 1985, the petitioner filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. During the course of the bankruptcy proceedings, a successor trustee filed an amended complaint (J.A. 3-4) and a motion for an order requiring the petitioner to surrender records of his businesses. (J.A. 5-7). The petitioner filed through counsel an answer to the complaint (J.A. 11-12) and a response to the motion. (J.A. 8-10). On the ground that the answer and response were knowingly false, the petitioner was charged in counts five, six and seven of a ten-count indictment with making false statements in violation of 18 U.S.C. § 1001.[1] (J.A. 13-16).

Paragraph three of the successor trustee's motion alleged that in response to a request of the original trustee, the petitioner had failed to surrender requested books and records. (J.A. 6-7).

1. The petitioner was also charged with four counts of bankruptcy fraud in violation of 18 U.S.C. § 152 (Counts 1-4) and three counts of mail fraud in violation of 18 U.S.C. § 1341 (Counts 8-10).



The petitioner's alleged false response, which comprised count five, was as follows: "That in Answer to the allegations contained in Paragraph Three of Trustee's Motion, Debtor denies same for the reason it is untrue. Debtor further states that the original trustee requested records, books, and documents which were delivered to her place of business and from which she photocopied many documents and surrendered the balance of the documents to the Debtor. Debtor further states that at no time has the Trustee nor his agents contacted Debtor or Debtor's attorney and requested the materials alleged to herein." (J.A. 10). Testimony adduced by the Government at the petitioner's criminal trial concerning count five established that after the petitioner had filed the response, the bankruptcy judge entered an order directing the petitioner to turn over documents at which time the petitioner delivered a carton of documents to the successor trustee. Government's Court of Appeals Brief at 14-15.

Counts six and seven were based upon two of the petitioner's denials contained in his answer to the trustee's amended complaint regarding the location of assets. Paragraph 10 of the complaint alleged that a well-drilling machine was stored at a certain address. (J.A. 4). The petitioner's answer to paragraph 10 of the complaint, which comprised count six of the indictment, was as follows: "That in Answer to the allegations contained in Paragraph Ten of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue." (J.A. 12). Paragraph 13 of the complaint alleged that drill bits and a drilling mechanism were at one time being stored on a certain property. (J.A. 4). The petitioner's answer to paragraph 13, which comprised count seven of the indictment, was as follows: "That in Answer to the allegations contained in Paragraph Thirteen of Trustee's First Amended Complaint Debtor denies same for the reason it is untrue." (J.A. 12). At the petitioner's criminal trial, the Government presented testimony with regard to counts six and seven that the petitioner had stored some items at the property.

Government's Court of Appeals Brief at 15-16. The Government also presented evidence that when the petitioner had attempted to insure the well-driller and drill bits approximately one year prior to the filing of his answer, he had represented that the drilling mechanism was then located at the property in question. *Id.*, at 16.

The petitioner was found guilty of all ten counts and was sentenced on counts one through nine to concurrent 24-month terms of incarceration. On count 10, sentence was suspended and the petitioner was placed on probation for five years to commence upon expiration of his prison sentence. On each of the 10 counts, the petitioner was assessed a consecutive fine.

On appeal to the Sixth Circuit, the petitioner challenged the § 1001 convictions on the ground, *inter alia*, that the false statements fell outside the scope of § 1001. In a split opinion, the majority affirmed. *United States v. Hubbard*, 16 F.3d 694 (6th Cir.1994).

## ARGUMENT

### A.

This case raises the question whether the so-called "judicial function" exception to Title 18, § 1001 bars the convictions of a party to a bankruptcy proceeding for false answers to a complaint and for a false response to a discovery motion. The question calls for a determination of the scope of § 1001's applicability to judicial proceedings which must commence with an examination of the language of the statute. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 2d 246 (1981). Title 18, § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.



The terms "department" and "agency" are defined in Title 18, § 6 which provides as follows:

> The term "department" means one of the executive departments enumerated in section 1 [now section 101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

Title 5, § 101 lists as executive departments the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, and Veteran Affairs.

The Reviser's Note to Title 18, § 6 states the following:

> The word "department" appears 57 times in Title 18, U.S.C., 1940 ed., and the word "agency" 14 times. It was considered necessary to define clearly these words in order to avoid possible litigation as to the scope or coverage of a given section containing such words. (See United States v. Germaine, 1878, 99 U.S. 508, 25 L.Ed. 482, for definition of words "department" or "head of department.")

*Germaine* was cited in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. __, __, 111 S. Ct. 2631, 2642, 115 L. Ed. 2d 764 (1991), wherein the Court noted in pertinent part:

> This Court for more than a century has held that the term "Department" refers only to "'a part or division of the executive government, as the Department of State, or of the Treasury," expressly "creat[ed]" and "give[n] the name of a department" by Congress. *Germaine*, 99 U.S., at 510-11. See also *Burnap [v. United States]*, 252 U.S. [512], at 515, 40 S.Ct. [374], at 376 [64 L.Ed. 692 (1920)] ("The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet").

The plain language of § 1001 and the definitions of "department" and "agency" unambiguously establish that the statute does not apply to statements made to the courts. Because



"the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Turkette*, 452 U.S., at 580, 101 S. Ct., at 2527, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). Where Congress intends a Title 18 statute concerning "departments" and "agencies" to include "courts" or the "judicial branch" within its ambit, it so provides in the statute. *See, e.g.*, 18 U.S.C. Appendix 2, § 5 ("All courts, departments, agencies, officers, and employees of the United States. . ."); 18 U.S.C. § 203(a)(1), (b)(1) (". . . before any department, agency, court, . . ."); 18 U.S.C. § 666(d)(2) ("the term 'government agency' means a subdivision of the executive, legislative, judicial, or other branch of government, . . ."); 18 U.S.C. § 1030(a)(7) ("the term 'department of the United States' means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5"); 18 U.S.C. § 2515 (". . . before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States,. . ."); 18 U.S.C. § 2518 (10)(a) ("Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States,. . ."); 18 U.S.C. § 2710(d) (". . . in or before any court, grand jury, department, officer, agency,. . ."); 18 U.S.C. § 3504(a) ("In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, . . ."). Accordingly, the petitioner's statements fall outside the ambit of § 1001, having been made within the jurisdiction of a court and not within the jurisdiction of a "department" or "agency" as defined by Congress.

However, in *United States v. Bramblett*, 348 U.S. 503, 509, 75 S. Ct. 504, 508, 99 L. Ed. 594 (1955), this Court stated in *dictum* that the word "department" "was meant to describe the

executive, legislative *and judicial branches of the Government*." (Emphasis supplied). As discussed in greater detail below in "B", the courts of appeals have adhered to *Bramblett*'s *dictum*, often with express misgivings. Indeed, in this case, the Court of Appeals stated that "[a]t first glance, one might be tempted to believe that the plain language of the statute prohibits application of § 1001 to the case at bar" because in "ordinary usage", the terms "department" and "agency" mean the divisions of the executive branch "and not the whole or any divisions of the judicial or legislative branches — Congress is not the Department of Lawmaking, nor is the U.S. Court of Appeals the Appellate Adjudication Agency. And the statutory definitions section of Title 18 [*i.e.*, § 6] seems to support this common sense view." *Hubbard*, 16 F.3d, at 703 n.4. However, the Court of Appeals opined that because *Bramblett* "has instructed us that the 'any department or agency' language of § 1001 is not to be restricted by § 6", it was "necessary to reject Hubbard's plain language argument . . .". *Id.*, at 699.

The case at bar questions *Bramblett*'s conclusions and raises the issue whether *Bramblett*'s holding and/or "dictum, and the Court[s] of Appeals' reliance upon it, cannot be squared with congressional intent, and should be 'recede[d] from' now that the issue . . . is 'squarely presented.' " *NLRB v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170, 188, 102 S. Ct. 216, 228, 70 L. Ed. 2d 323 (1981), quoting *NLRB v. Boeing Co.*, 412 U.S. 67, 72, 93 S. Ct. 1952, 1955, 36 L. Ed. 2d 752 (1973).

In *Bramblett*, a former member of Congress was prosecuted under § 1001 for a false representation to the disbursing office of the House of Representatives. In the district court, the defendant challenged the applicability of the statute to the legislative branch. The government argued that the statute was not ambiguous and that Congress intended the statute to apply to all



branches of the Government. The district court reviewed the history of § 1001, Congress' definitions of "department" and "agency", the "significant" Reviser's Notes to 18 U.S.C. § 6 as well as Congress' use of the term "department" in other statutes. *United States v. Bramblett*, 120 F. Supp. 857, 858-864 (D.D.C.1954). Finding the issue to be one of first impression, the district court reasoned that "[i]t seems apparent . . . upon a reading of . . . Section 6 of Title 18 and Section 1 of Title 5, that Congress intended to limit the words 'department or agency' to the executive branches of the Government unless the context shows that such term was intended to include the legislative or judicial branches of the Government." *Bramblett*, 120 F. Supp., at 862. The district court cited other provisions in Title 18 as examples of contexts where Congress intended the terms "department or agency" to describe branches of Government other than the executive. Concluding that there was reasonable doubt as to the scope of § 1001, the district court resolved the doubt in favor of the defendant. *Id.*, at 862-864

On direct appeal by the Government, this Court reversed.[2] The decision, which turned upon a view of the legislative history of the statute contrary to that of the district court, found no evidence in committee reports or debates that the statute was to have a restricted scope. The Court felt that the terms "department or agency" were "apparently" added "to indicate that not all falsifications but only those made to government organs were reached", *Bramblett*, 348 U.S., at 507, 75 S. Ct., at 507, and that the legislative history "dispels the possibility of attaching any significance" to the new phraseology. *Id.*, at 508. With regard to Congress' definitions of "department" and "agency" in 18 U.S.C. § 6, the Court concluded that "[i]t would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to

2. The Chief Justice and Justices Burton and Harlan did not participate.

leave frauds such as this without penalty." *Bramblett*, 348 U.S. at 509, 75 S. Ct. at 508.

The decision in *Bramblett* is contrary to the plain language of § 1001. In deeming the terms "department or agency" insignificant, the *Bramblett* Court violated the "ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171, 110 S. Ct. 997, 1000, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring). From this rule of construction it logically follows that when Congress supplies definitions for statutory words, as is the case here, effect must be given to the definitions as well. In failing to so construe the terms of § 1001, *Bramblett* improperly broadened the scope of the statute beyond its plain language and wrongfully "resort[ed] to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, __ U.S. __, __, 114 S. Ct. 655, 662, 126 L. Ed. 2d 615 (1994).

In any event, the sparse legislative history relied upon in *Bramblett* is hardly conclusive. In fact, it is equally supportive of the contrary conclusion that the statute was not intended to apply to conduct or statements made to the judiciary. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon*, 494 U.S., at 160, 110 S. Ct., at 1002. A review of the legislative history of § 1001 reveals that we are not here dealing with that "rare" case, but one which, consistent with providing "fair warning", demands a construction no broader than the terms of the statute itself as well as the definitions of those terms supplied by Congress.

The Act of October 23, 1918, Ch. 194, 40 Stat. 1015, was the first federal criminal statute prohibiting the making of a false statement. *United States v. Yermian*, 468 U.S. 63, 70, 104 S. Ct.



2936, 2940, 82 L. Ed. 2d 53 (1984). The statute provided, *inter alia*, that whoever "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher," etc., shall be punishable by fine or imprisonment or both. In *United States v. Cohn*, 270 U.S. 339, 46 S. Ct. 251, 70 L. Ed. 616 (1926), the Government argued that the terms "with the intent of defrauding" should be broadly construed as intending not merely cheating the Government out of property or money, but also in the sense of interfering with or obstructing a lawful governmental function by deceit and fraud. This Court rejected the Government's broad reading. "[I]f Congress had intended to prohibit all intentional deceit of the Federal Government, it would have used the broad language then employed in 18 U.S.C. Sec. 37, which 'by its specific terms, extends broadly to every conspiracy . . .' with no words of limitation whatsoever." *Yermian*, 468 U.S., at 71, 104 S. Ct., at 2940, quoting *Cohn*, 270 U.S., at 346, 46 S. Ct., at 253.

Under this version of the statute, the Secretary of the Interior felt unable to enforce the provisions of the National Industrial Recovery Act of 1933 which prohibited interstate transportation of "hot oil." Congress therefore passed H.R. 8046, which prohibited the making of false statements "to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States . . .". President Roosevelt vetoed the bill not only because it was no broader than the 1918 Act, but also because it reduced the penalties. *Yermian*, 468 U.S., at 71, 104 S. Ct., at 2941. "This was hardly the measure needed to increase the protection of federal agencies from the variety of deceptive practices plaguing the New Deal administration." *Id.*

Congress reacted by passing the Act of June 18, 1934, 48 Stat. 996. The 1934 provision was enacted eliminating the "purpose" clauses and penalizing anyone who

> shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . .[3]

This enactment came "at the urging of some of the newly created regulatory agencies". *United States v. Rodgers*, 466 U.S. 475, 478, 104 S. Ct. 1942, 1945, 80 L. Ed. 2d 492 (1984). There is nothing in the legislative history of the statute that indicates any intention to criminalize statements made in judicial proceedings. To the contrary, the legislative history indicates the terms "department" and "agency" were employed in lieu of language that would have limited application of the statute to matters within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry, "so as to cover all the departments." 78 Cong. Rec. 2858-2859 (1934). Congress' driving force was its intent to make the law "applicable to the new operations of the Government", 78 Cong. Rec. 3724 (1934), which obviously would not include the courts. The types of activities in question were far removed from the judiciary. *See* 78 Cong. Rec. 11270 (1934) ("There is nothing which permits us to make an investigation and prosecute persons who are engaged in the 'kick-back' practice. They make false returns, claiming that they

3. The 1934 act proscribed false claims and false statements. In 1948, the false claims provision was codified as 18 U.S.C. § 287 and the false statement provision as 18 U.S.C. § 1001.



paid certain amounts to their employees, when they have not done so. This bill just amends the law so as to give the Federal Government authority to deal with that class of cases."). *See also* S. Rep. No. 1202, 73d Cong., 2d Sess. (1934) (amendment was designed to reach "hot oil" cases, and also cases involving contractors on Public Works Administration projects who falsified certificates as to the wages being paid). As amended, the statute reflected "the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States v. Gilliland*, 312 U.S. 86, 93, 61 S. Ct. 518, 522, 85 L. Ed. 598 (1941).

As previously noted, where Congress has intended a statute which concerns "departments" and "agencies" to be broader than the statutory definitions of 18 U.S.C. § 6, it has so provided. In fact, the phrase "before any department" has been found to express a Congressional intent to *exclude* courts. *See, e.g., United States v. Waldin*, 122 F. Supp. 903 (E.D. Pa. 1954); *United States v. Adams*, 115 F. Supp. 731 (D.N.D. 1953). "That Congress did not include such language, either in the 1934 enactment or in the 1948 revision, provides convincing evidence. . . " that the statute was not intended to reach courts. *Yermian*, 468 U.S., at 72, 104 S. Ct., at 2942. Alternatively, if there has been an intention to include the judiciary, Congress could have enacted the statute "with no words of limitation. . . ". *Yermian*, 468 U.S., at 71, 104 S. Ct., at 2940, quoting *Cohn*, 270 U.S., at 346, 46 S. Ct., at 253. Neither being the case here, the legislative history, at best for the Government, is ambiguous, and at worst for the Government, demonstrates an intent consistent with the statute's express limitation to statements made to "departments" or "agencies" as those terms have been previously defined and commonly understood and as those terms are defined in § 6 of Title 18.

*Bramblett* was also concerned that "Congress could not have

intended to leave frauds such as this without penalty." *Bramblett*, 348 U.S. at 509, 75 S. Ct. at 508. Such a concern cannot justify a judicial broadening of the scope of a statute for several reasons. First, it is not for the courts to legislate criminal liability where Congress has not, *United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 522-523, 30 L. Ed. 2d 488 (1971), and certainly not in the name of statutory construction.

Second, *Bramblett*'s concern is ill-founded because there is no glaring gap in coverage. Congress has provided criminal penalties in Title 18 for acts of fraud or dishonesty committed in judicial proceedings. *See, e.g.*, § 401 (contempt); § 1501 *et seq.* (obstruction of justice); § 1512 (improper influence of official proceeding); § 1621 (perjury); § 1622 (subornation of perjury); § 1623 (false declarations).[4] Additionally, Rule 11 of the Federal

4. This Court has been reluctant to ascribe to Congress an intent to criminalize behavior where the statutory language hints of no such intent and where such behavior is amply addressed elsewhere. For example, in *Williams v. United States*, 458 U.S. 279, 287, 102 S. Ct. 3088, 3093, 73 L. Ed. 2d 767 (1982), this Court stated in pertinent part the following in interpreting § 1014:

> Yet, if Congress really set out to enact a national bad check law in Sec. 1014, it did so with a peculiar choice of language and in an unusually backhanded manner. Federal action was not necessary to interdict the deposit of bad checks, for, as Congress surely knew, fraudulent checking activities already were addressed in comprehensive fashion by state law. [citation omitted] Absent support in the legislative history for the proposition that Sec. 1014 was "designed to have general application to the passing of worthless checks," [citation omitted] we are not prepare to hold petitioner's conduct proscribed by that particular statute.

Thus, here, as was the case in *Williams*, "[t]he legislative history does not demand a broader reading of the statute." 458 U.S., at 288, 102 S. Ct., at 3094.



Rules of Civil Procedure authorizes the impositions of sanctions upon counsel and parties. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991). While it is true that prosecution under § 1001 is not precluded merely because another statute may proscribe the same conduct, *Woodward*, 469 U.S. 105, at 109-110 (1985), the question here is not one of preclusion but of intended scope, *i.e.*, whether § 1001 should apply in the first place. The existence of other and more specific means of policing false pleadings filed by parties during litigation offers additional support to the observation, shared by nearly every court of appeals that has addressed the issue, that "[t]he legislative history [of § 1001] reveals no evidence of an intent to pyramid punishment for offenses covered by another statute as well as by § 1001." *United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991). *See also United States v. Mayer*, 775 F.2d 1387, 1390 (9th Cir. 1985) (§ 1001 "should not be permitted to swallow up perjury and other federal statutes"); *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978) (legislative history reveals no evidence of intent to pyramid); *United States v. Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967) (application of § 1001 to judicial proceedings would undermine the effectiveness of the perjury statute); *Friedman v. United States*, 374 F.2d 363, 367 (8th Cir. 1967) ("a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath.").[5]

Finally, as discussed in greater detail below, almost

5. Also consistent with this view is the United States Attorneys' Manual which, as noted in *United States v. Deffenbagh*, 957 F.2d 749, 752 (10th Cir. 1992), "provides that '[p]rosecutions should not be brought under 18 U.S.C. § 1001 for false statements submitted in federal court proceedings,' but rather such prosecutions should be under 18 U.S.C. §§ 1503 and 1621." *See* United States Department of Justice, United States Attorney's Manual, § 9-69.267 (1984).

immediately after *Bramblett* was decided, the courts of appeals commenced carving out exceptions to that decision, imposing various restrictions upon the applicability of § 1001 to judicial proceedings. Those restrictions have been in place for more than three decades during which time Congress has taken no action to repudiate them. If the limitless scope of § 1001 suggested by the Government were intended by Congress, one might reasonably have expected during this substantial period of time some Congressional response to the restrictions in the form of amendment to the statute to expressly include the judicial branch.

Even assuming, *arguendo*, that the term "department" includes the judiciary, the conclusion that § 1001 was not intended to reach documents such as those filed by the petitioner is, at the very least, equally plausible, as evidenced by the failure of any circuit to have held that § 1001 applies to documents filed by a party in the course of litigation under circumstances such as those in the case at bar. The "time-honored interpretive guideline" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity", *Dowling*, 473 U.S., at 228, 105 S. Ct., at 3139, quoting *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2004, 2089 (1985), quoting in turn *Rewis v. United States*, 401 U.S. 808, 812, 91 S. Ct. 1056, 1059, 28 L. Ed. 2d 493 (1971), warrants adoption of the narrower construction. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S. Ct. 227, 229, 97 L. Ed. 260 (1952), quoted in *Dowling*, 473 U.S., at 214, 105 S. Ct., at 3131, in *Williams*, 458 U.S., at 286, 102 S. Ct., at 3094, and in *Bass*, 404 U.S., at 347, 92 S. Ct., at 522.

This principle advances two policies: "first, 'a fair warning should be given to the world in a language that the common world



will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.' *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931) (Holmes, J.)." *Bass*, 404 U.S., at 348, 92 S. Ct., at 522. *See also United States v. Cardiff*, 344 U.S. 174, 73 S. Ct. 189, 97 L.Ed. 200 (1952); *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37 (1820). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. "This policy embodies the 'instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)." *Bass*, 404 U.S., at 348, 92 S. Ct., at 522-523. It is probably fair to say that most members of the bar would be startled to learn that a false denial contained in an answer to a complaint filed in a federal court subjects the maker to criminal liability under § 1001. Of course, that fact alone would obviously not be dispositive of the scope of § 1001. However, it is certainly significant that for the past sixty years, there has been no signal from the Congress or the courts to the contrary and consequently no "fair warning" that such conduct has been marked for criminal prosecution.

Allowing § 1001 prosecutions in connection with litigation and discovery poses grave potential for abuse. The Tenth Circuit expressed its concern on this matter in *Deffenbagh, supra,* in the context of a discovery subpoena issued in connection with a grand jury probe. The defendant was charged with a § 1001 violation upon the allegation that he did not supply all of the documents requested. The Court of Appeals stated:

> We are also reluctant to allow the Justice Department, which apparently initiated the discovery subpoena, the power to prosecute

> under § 1001 persons who allegedly did not comply completely. There is considerable room for error or misunderstanding in compliance with subpoenas duces tecum. Parties considering discovery requests in any litigation situation, including grand jury proceedings, often will interpret such commands narrowly. To give the Department of Justice power to prosecute allegedly false statements under Sec. 1001 in connection with a form affidavit of compliance with a subpoena would give the government a more powerful weapon than we believe Congress intended.

*Deffenbagh*, 957 F.2d, at 754.[6] The same considerations apply to the preliminary stages of litigation where parties have yet to undertake investigations or frame all of the issues but are operating under the pressures of time constraints and procedural requirements imposed by the applicable court rules.[7]

Because 1001 has not "plainly and unmistakably" rendered

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6. The testimony relied upon by the Government to convict the petitioner for his discovery response that he was not in possession of the requested documents established that the petitioner did turn over the documents in response to an order of the bankruptcy judge. This is precisely the type of dispute which can give rise to "considerable room for error or misunderstanding in compliance", *Deffenbagh*, 957 F.2d, at 754, and is ill-suited to resolution via criminal prosecution.

7. Subjecting all pleadings filed in federal litigation to the possibility of criminal liability under § 1001 could have other farreaching consequences. Prevailing parties, especially those in hotly contested matters or those who are vindictive, will be encouraged to refer for prosecution the losing parties or their counsel for having made "statements" that could be deemed "false" or for having "concealed" or "covered up".



filings in litigation such as the petitioner's subject to criminal punishment, *Bass*, 404 U.S., at 348, 92 S. Ct., at 522, and because the "text, structure and history fail to establish that the Government's position is unambiguously correct", *United States v. Granderson*, __ U.S. __, 114 S. Ct. 1259, 1267, 127 L. Ed. 2d 611 (1994), the petitioner's § 1001 convictions are invalid.

**B.**

Even if § 1001 applies to judicial proceedings, virtually all of the courts of appeals have concluded that the statute is not without some limitations in the judicial arena. However, in the various applications of § 1001 addressed and/or approved by this Court, none to date has involved statements made in court. *See, e.g., Yermian, supra* (false statements to employer eventually submitted to federal agency); *Rodgers, supra* (false statement to FBI and Secret Service that wife had been kidnapped and that she was involved in a plot to assassinate the president); *United States v. Knox*, 396 U.S. 77, 90 S. Ct. 363, 24 L. Ed. 2d 275 (1969) (false wagering registration form filed with Internal Revenue Service); *Bryson v. United States*, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969) (affidavit filed with National Labor Relations Board falsely denying affiliation with Communist Party); *United States v. Bramblett, supra* (statement to disbursing office of House of Representatives); *United States v. Gilliland, supra* (false reports filed with Secretary of Interior concerning amount of petroleum produced from certain wells).

The application of § 1001 to judicial proceedings was touched upon by this Court in *Rodgers*. In that case, the defendant claimed that his allegedly false statements to the FBI and Secret Service were not matters "within the jurisdiction" of the respective agencies as that language is used in § 1001. The District Court granted Rodgers' motion to dismiss and the Eighth Circuit affirmed, finding itself bound by its prior decision in

*Friedman v. United States, supra*. Resolving a conflict among the circuits, this Court reversed, ruling *inter alia*, that the term "jurisdiction" as used in § 1001 did not admit of the constricted construction adopted by the Court of Appeals. In footnote four of the opinion in *Rodgers*, this Court responded as follows to the Eighth Circuit's concern in *Friedman* about the adverse effect a literal construction of § 1001 could have upon the taking of oaths in courts:

> The Eighth Circuit also expressed concern that a literal application of the statute would obviate the taking of oaths in judicial proceedings. "Since the Judiciary is an agency of the United States Government, a strict application of this statute would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Friedman v. United States*, 374 F.2d, at 367. Several courts faced with that question have in fact held that § 1001 does not reach false statements made under oath in a court of law. See, *e.g.*, *United States v. Abrahams*, 604 F.2d 386 (CA5 1979); *United States v. D'Amato*, 507 F.2d 26 (CA2 1974) (holding limited to private civil actions); *United States v. Erhardt*, 381 F.2d 173 (CA6 1967) (per curiam). But they have mostly relied, not on a restricted construction of the term "jurisdiction," but rather on the phrase "department or agency." These courts have held that, although the federal judiciary is a "department or agency" within the meaning of § 1001 with respect to its housekeeping or administrative functions, the judicial proceedings themselves do not so qualify.



> *Abrahams, supra*, at 392-393; *Erhardt, supra*, at 175. See also *Morgan v. United States*, 114 U.S.App.D.C. 13, 16, 309 F.2d 234, 237 (D.C.Cir.1962), cert. denied, 373 U.S. 917, 83 S.Ct. 1306, 10 L. Ed. 2d 416 (1963). We express no opinion on the validity of this line of cases.

The decision of the District of Columbia Circuit in *Morgan* is credited as having given rise to what came to be known as the "judicial function" or "adjudicative function" exception to § 1001. In *Morgan*, the defendant was convicted under § 1001 for falsely representing to a court that he was a licensed attorney. On appeal, the defendant argued that § 1001 was inapplicable because his conduct did not involve a "matter within the jurisdiction of any department or agency of the United States" but rather involved a matter within the jurisdiction of a court. In finding § 1001 applicable to the defendant's conduct, Judge Bazelon, writing for the Court of Appeals, reluctantly followed the *Bramblett dictum* as follows:

> Were we examining the statute without the benefit of prior Supreme Court construction, perhaps we would agree with appellant that Congress did not intend it to apply to courts (especially in light of 18 U.S.C. § 6 which states that the term "department" means "one of the executive departments * * * unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government"). But the Supreme Court has explicitly stated, in *Bramblett* . . . that the "context" of § 1001 "calls for an unrestricted interpretation" and that the word "'department,' as used in this

> context, was meant to describe the executive, legislative *and judicial branches of Government.*"

*Morgan*, 309 F.2d, at 237 (emphasis by the court), quoting *Bramblett*, 348 U.S., at 509, 75 S. Ct., at 508. Morgan went on to note, however, that § 1001 was not without any limitations. In discussing whether, within the meaning of § 1001, a defendant "covers up" a material fact when he pleads not guilty, or whether an attorney violates § 1001 when he moves to exclude hearsay testimony he knows to be true, or whether a summation on behalf of a client counsel knows to be guilty also violates § 1001, the *Morgan* court, in *dictum*, stated the following:

> We are certain that neither Congress nor the Supreme Court intended to include traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court.

*Morgan*, 309 F.2d, at 237. The distinction drawn in *Morgan* between the adjudicative and administrative functions of the courts gained approval in several circuits. *See, e.g., United States v. Masterpol*, 940 F.2d 760 (2d Cir.1991); *United States v. Holmes*, 840 F.2d 246 (4th Cir.), *cert. denied*, 488 U.S. 831, 109 S. Ct. 87, 102 L. Ed. 2d 63 (1988); *United States v. Lawson*, 809 F.2d 1514 (11th Cir.1987); *United States v. Abrahams*, *supra*; *United States v. Erhardt*, *supra*. If *Morgan* and its progeny are correct, the petitioner's statements clearly fall outside the ambit



of § 1001 whether viewed as constituting "traditional trial tactics" or concerning the "judicial" machinery of the court.

**(1)**

The phrase "traditional trial tactics" was apparently coined in *Morgan* in response to the absurd and unjust results which could flow from a literal application of § 1001. The defendant in *Morgan* suggested that § 1001 would apply, if not subject to some limitations, to traditional criminal trial practices such as a guilty defendant's plea of not guilty, or a motion to suppress evidence, or a summation to a jury. In concluding that § 1001 could not be read as punishing such "traditional trial tactics", *Morgan* is consistent with well-settled rules of statutory construction.

As noted in *In re Chapman*, 166 U.S. 661, 667, 17 S. Ct. 677, 680, 41 L. Ed. 1154 (1897), "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion". Chief Justice Hughes in *Sorrells v. United States*, 287 U.S. 435, 450, 53 S.Ct. 210, 216, 77 L.Ed. 413 (1932) amplified upon this maxim as follows: "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to legislative purpose, is, as we have seen, a traditional and appropriate function of the courts." It is both unjust and absurd that a statute should be read as subjecting to criminal prosecution the federal criminal trial practices of pleading not guilty, moving to suppress or exclude evidence and presenting summations to juries where the statute admits to an alternative reading. Additionally, these federal criminal trial practices implicate constitutional guarantees such as the presumption of innocence, the privilege against self-incrimination and the right to effective assistance of counsel. Consequently, a literal application of § 1001 must be avoided for the additional reason that "every reasonable construction must be resorted to, in order

to save a statute from unconstitutionality." *Chapman v. United States*, 500 U.S. 453, 464, 111 S. Ct. 1919, 1927, 114 L. Ed. 2d 524 (1991), quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397, 99 L. Ed. 2d 645 (1988).

The Solicitor General has argued in its brief on jurisdiction that a plea of not guilty is distinguishable from the petitioner's statements in that the former falls outside the purview of § 1001 "because it is not a statement of fact, but rather a formal notice of nonacquiescence." Brief for the United States at 8. But a denial made in response to an allegation contained in a complaint is no less a "formal notice of "nonacquiescence". In fact, it has been long understood that an entire cause of action can be "put at issue by a general denial", *United States v. McCoy*, 193 U.S. 593, 597, 24 S. Ct. 528, 530, 48 L. Ed. 805 (1904), and that a general denial will "put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition. . . ". *County of Nemaha v. Frank*, 120 U.S. 41, 45, 7 S. Ct. 395, 397, 30 L. Ed. 584 (1887). *See also United States v. American Tobacco Co.*, 166 U.S. 468, 470, 17 S. Ct. 619, 620, 41 L. Ed. 1081 (1897) (noting that the "usual general denial of all the allegations of the petition was filed by the attorney general on behalf of the United States. . . ."); *United States v. Weld*, 127 U.S. 51, 53, 8 S. Ct. 1000, 1001, 32 L. Ed. 62 (1888) ("The answer of the United States consisted of a general denial of all the material allegations in claimant's petition. . . .").

"The general denial has 'deep roots' in both common law and code pleading practice." *United States v. Minissee*, 113 F.R.D. 121, 122 (S.D. Ohio 1986), citing 5 Wright & Miller, *Federal Practice and Procedure* § 1265, citing in turn Shipman, *Common-Law Pleading* (3d ed. 1923) § 169, and Clark, *Code Pleading* (2d ed. 1947), § 92. To this day, general denials are permitted under Rule 8(b) of the Federal Rules of Civil



Procedure. While it is true that a general denial must be made "in good faith" and is subject to the obligations of Rule 11, Rule 8(b)

> does not contemplate an elaborate reply to every allegation of a complaint. It does not bind a defendant to his, her, or its responses for all time. It does not even condemn averments of insufficient information or knowledge upon which to form a belief as to the truth of the complainant's allegations. The rules governing responsive pleadings require merely that an answer be sufficiently particular to inform the plaintiff what defenses he, she, or it will be called upon to meet.

*White v. Smith*, 91 F.R.D. 607, 608 (W.D.N.Y.1981).[8] Even though the petitioner's denials and his discovery response were more specific than general denials, they nevertheless were denials subject to further investigation, proof and judicial fact-finding. Thus, the same considerations apply.

Under the government's view of § 1001, traditional trial practices would be subject to revolutionary change. The specter of criminal prosecution would hang over every document filed and every word spoken in the federal judicial system. Attorneys would not be immune. They would have to be concerned about being charged as principals under § 1001, aiders and abettors under 18 U.S.C. § 2, or coconspirators under 18 U.S.C. § 371. "We do not assume that Congress, in passing laws, intended such

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8. Under the Government's claimed scope of § 1001, the filing of the general denial by the assistant attorney general in *White v. Smith, supra*, would arguably constitute a crime because it was knowingly false. Criminal charges in such cases are an absurdity. The district judge in *White* found the threat of Rule 11 sanctions sufficient.

results." *United States v. X-Citement Video, Inc.*,__ U.S. __, __ (1994). Of course it is true that vigorous advocacy does not entail "knowing falsification" or "lying to the court". Brief for the United States at 8-9. But the chilling effect which would result from the Government's position cannot be ignored. *See Mayer*, 775 F.2d, at 1389 ("In reading *Morgan*, we sense a concern that applying § 1001 to positions taken before a court during litigation could inhibit vigorous advocacy of parties' interests, particularly those of a defendant in a criminal case."). At the very least, every step of the pleading stage would require burdensome prophylactic measures such as written and oral warnings and disclaimers. *See Crandon*, 494 U.S., at 177-178, 110 S. Ct., at 1011 (Scalia, J., concurring) ("Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion . . .".) Nothing in the language of § 1001, its legislative history, its predecessor statutes, or its interpretation, has suggested the need for or the applicability of criminal sanctions in the realm of procedural filings in civil and criminal litigation.

In *Yermian, supra*, a sharply divided Court held that proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction under § 1001. After tracing the evolution of the statute, the dissenting opinion reached the following conclusion:

> Of course "[i]t is not unprecedented for Congress to enact [such] stringent legislation," *United States v. Feola*, 420 U.S. 671, 709, 95 S.Ct. 1255, 1276, 43 L.Ed.2d 451 (STEWART, J., dissenting). But I cannot subscribe to the Court's interpretation of this statute in such a way as to "make a surprisingly broad range of unremarkable conduct a violation of federal law," *Williams v. United States*, 458 U.S. 279, 286, 102 S.Ct. 3088, 3093, 73 L.Ed.2d 767 (1982), when the legislative history simply "fails to evidence congressional awareness of the statute's claimed scope." *Id.*, at 290, 102 S.Ct., at 290.



*United States v. Yermian*, 468 U.S., at 82-3, 104 S. Ct., at 2946-47 (Rehnquist, C.J., dissenting). The scope of § 1001 claimed here by the Government far exceeds that advanced in *Yermian*.

Because Morgan's interpretation that § 1001 excludes criminal liability for traditional trial practices is appropriate to avoid unjust and absurd results[9], and because the petitioner's filings fall within such practices, the § 1001 convictions should be vacated.

(2)

Under *Morgan* and its progeny, the petitioner's statements also fall outside the scope of § 1001 as implicating the

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9. Another absurdity which would flow from the Government's interpretation is that a false unsworn statement in a bankruptcy proceeding would warrant conviction and incarceration even though such a statement is insufficient to bar discharge. *In re Kunec*, 27 B.R. 670 (M.D. Pa. 1982), citing 11 U.S.C. § 727. This anomaly is one of the results of the inconsistency between an expansion of § 1001 and the present bankruptcy statutory scheme which places great significance upon and attaches severe penalties to falsehoods made under oath. Under 18 U.S.C. § 152, bankruptcy crimes include the making of a false oath or account, the use or presentation of a false claim, the giving or receiving of money for acting or forbearing to act, and the withholding from an officer of the estate entitlement to possession of books and records relating to the debtor's financial affairs. For these and other reasons, the decision of the Court of Appeals in the case at bar has been characterized as a "result to be avoided if the current balance of laws and status of the bankruptcy courts are to be maintained." Collier on Bankruptcy, 7A.03 at 7A-140 (15th ed.1994).

"adjudicative" as opposed to the "administrative" or "housekeeping" functions of the bankruptcy court. This so-called "judicial function" exception represents a narrow but salutary limitation upon an overly expansive, unintended and unforeseeable interpretation of § 1001.

That the petitioner's statements involved the "judicial" as opposed to the "administrative" or "housekeeping" functions of the bankruptcy court appears to be without controversy. The statements were made during the course of litigation and were, essentially, "an extension of the defendant's trial itself." *Masterpol*, 940 F.2d, at 766, quoting *Mayer*, 775 F.2d, at 1391-92. The controversy is over whether the distinction between the functions is warranted in the first place. The Government criticizes the distinction between the two functions as "elusive", and argues that the courts of appeal are not always consistent in their decisions on the issue. Brief for the United States at 7. Even if the Government is correct, it does not follow that the exception is ill-founded. In fact, inconsistencies are a likely result of the necessarily fact-specific inquiry into whether conduct falls within the adjudicative or administrative function. Such a determination requires a case by case approach which "often may be a close question". *United States v. Holmes*, 840 F.2d at 248. As with most close questions, reasonable persons may differ as to the appropriate outcome. But here, as was the case in *Holmes*, determining which function applies "is not challenging." *Id.* The petitioner's statements clearly fall within the "adjudicative" function.[10]

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10. Several courts of appeals have addressed the exception with regard to false statements made during criminal proceedings. Comparing the decisions finding an adjudicative function, *see, e.g., Masterpol, supra*, 940 F.2d at 764-65 (defendant's submission of false letter of recommendation to sentencing judge falls within adjudicative function); *Mayer, supra* (same as *Masterpol*); *Abrahams, supra* (defendant's false statements to magistrate during removal hearing fall within adjudicative function); *Erhardt, supra*
(Cont'd)



There are additional reasons not to abandon the judicial function exception. Since it was first suggested in 1962 in *Morgan*, "there has been no response on the part of Congress either repudiating the limitation or refining it. It therefore seems too late in the day to hold that no exception exists." *Mayer*, 775 F.2d, at 1390. *Accord United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993); *Masterpol*, 940 F.2d, at 766. Although congressional silence in the face of judicial statutory interpretation is not necessarily indicative of legislative acceptance of the interpretation, the passage of more than three decades since *Morgan* without any sign of disapproval from Congress provides additional grounds against dismantling the exception.

In the case at bar, the Court of Appeals "decline[d] to adopt the judicial function exception", *Hubbard*, 16 F.3d, at 701, for four reasons. "First, the Supreme Court in *Bramblett* said that § 1001 was to be read broadly and *Bramblett* never indicated that there might be such a thing as a judicial function exception." *Id.* But in expounding a broad reading, this Court never approved a limitless one. Moreover, it is precisely because the statute is couched in broad terms that the courts must be careful to ensure that reasonable limits are observed. And while it is true that *Bramblett* did not announce a judicial function exception to § 1001, it is also true that the issue was not squarely presented. It is just as easily said, and just as significant, that *Bramblett* did not proscribe a judicial function exception.

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(Cont'd)
(defendant's submission of false receipt as evidence during criminal proceeding falls within adjudicative function), with those finding an administrative function, *see, e.g., United States v. Barber*, 881 F.2d 345 (7th Cir. 1989) (even if exception were valid, false information sent to judge to influence sentencing of third party violated statute), *cert. denied*, 495 U.S. 922, 110 S. Ct. 1956, 109 L. Ed. 2d 318 (1990); and *Holmes, supra* (defendant's falsification of standardized consent forms falls within administrative function), it is evident that even if the petitioner's statements were made in criminal proceedings, the adjudicative function would apply.

The next reason given by the Court of Appeals is as follows: "Second, we agree with the *Poindexter* court [*United States v. Poindexter*, 951 F.2d 369 (D.C. Cir.1991)] . . . that the judicial function exception does not rest on solid ground." *Hubbard*, 16 F.3d, at 701. The answer to this argument requires consideration of the decision in *Poindexter*.

In *Poindexter*, the Court of Appeals was asked to carve out a legislative function exception to § 1001. In revisiting its decision in *Morgan*, the Court of Appeals stated the following:

> The judicial function exception traces to a dictum in *Morgan v. United States*, 309 F.2d 234 (D.C.Cir.1962), the holding of which is that § 1001 does apply to one who practiced law by "falsely [holding] himself out to be" another person and member of the bar. *Id.* at 235, 237. We relied upon Supreme Court precedent to conclude that a court could be a "department" for purposes of § 1001, but also cautioned that the Congress did not intend that the statute apply to "traditional trial tactics." *Id.* at 237 (citing *Bramblett*, 348 U.S. at 509, 75 S.Ct. at 508). We viewed the acts charged, however, as involving the court's "administrative" or "housekeeping" functions, rather than the "judicial" machinery of the court. *Id.*

*Id.*, at 386. In refusing to carve out a legislative function exception to § 1001, it is true that the Court of Appeals in *Poindexter* declined to extend *Morgan*, doubting that its rationale governing "traditional trial tactics" would "shield[] from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding." *Id.*, at



387. The Court of Appeals did note, however, that *Morgan* and the opinions of other circuits were concerned that the terms "'conceals or covers up' not be applied to sanction 'traditional trial tactics' ", *id.*, at 387, citing as an example *United States v. Mayer, supra*.

The problem with *Poindexter* is the conflict between its suggestion that *Morgan* might not prohibit § 1001 prosecution for false statements made in judicial proceedings and its recognition of the widespread concern that § 1001 not be used to punish traditional trial tactics. The proper resolution of that conflict is not through a broadening of the scope of § 1001 by the courts. And the concern over the punishment of such statements vests exclusively with Congress. Because the judicial function exception both advances the express scope of § 1001 and avoids absurd and unjust results, it does, contrary to the Court of Appeal's characterization of *Poindexter*, rest upon solid legal ground.

Third, the Court of Appeals noted that "if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath". *Hubbard*, 16 F.3d, at 701. But the concern about § 1001's relationship to perjury is not one of overlap, but rather, as previously noted, that its "strict application ... would remove the time-honored and now necessary formality of requiring witnesses to testify under oath." *Friedman v. United States*, 374 F.2d, at 367. Moreover, overlap exists anyway because unsworn false statements are punishable under statutes other than perjury.[11]

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11. *See, e.g.*, 18 U.S.C. §§ 401 (contempt); 1501 *et seq.* (obstruction of justice); 1512 (improper influence of official proceeding). *See also* Rule 11 of the Federal Rules of Civil Procedure. Additionally, in the context of bankruptcy proceedings, the knowing and fraudulent making of a false oath or

(Cont'd)

As its last reason, the Court of Appeals stated that it read this Court's decision in *Rodgers* as "cautioning against an automatic acceptance" of the exception. *Hubbard*, 16 F.3d, at 701. "[W]e will instead wait for the Supreme Court to tell us there is such an exception before approving it for use in this Circuit." *Id.* The petitioner obviously hopes that the Court of Appeals' wait is over.

The Court of Appeals also declined to apply *United States v. D'Amato*, 507 F.2d 26 (2d Cir. 1974). In *D'Amato*, the Second Circuit reversed a § 1001 conviction for the filing of a false affidavit during a civil action in federal court to which the government was not a party. *D'Amato* noted that § 1001 has never been applied to a false statement in a private civil action "where the Government is involved only by way of a court deciding a matter in which the Government or its agencies are not involved." *Id.*, at 28. Analyzing the statute's legislative history as interpreted in *Bramblett* and *Gilliland*, the Second Circuit in *D'Amato* found no support for the Government's expansive view that the statute applies to all false statements made in the courts. Rather, the legislative history indicated to the *D'Amato* court that the applicability of § 1001 often turned upon whether the false statement in question was intended to deceive the government or its agencies. However, in the private civil action at issue in *D'Amato*, the court observed that there was neither a fraud upon the Government nor a deception upon an investigative or regulatory agency. In rejecting the Government's view that the mere involvement of a court renders § 1001 applicable, the *D'Amato* court drew from the distinction *Morgan* found between administrative and judicial court functions, agreeing therefrom

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(Cont'd)
account in connection with a bankruptcy case is sufficient to bar a debtor's discharge. 11 U.S.C. § 727(a)(4)(A). In bankruptcy proceedings, deliberate omissions by the debtor in schedules or statements of financial affairs or sworn testimony may also result in the denial of discharge. *See In re Chalik*, 748 F.2d 616 (11th Cir. 1984) and cases cited.



that § 1001 was never intended to apply to every statement made before a federal court.

In *Masterpol, supra*, the Second Circuit applied the rationale of *D'Amato* to reject a theory of prosecution that the defendant had defrauded the government as court, not the government as prosecutor. The court found that the "government offers no reason why that holding [in *D'Amato*] should not apply with equal force to a federal court hearing a criminal matter; nor can we envision any." *Masterpol*, 940 F.2d, at 765.

In *United States v. London*, 714 F.2d 1558 (11th Cir.1983), the Eleventh Circuit also voiced agreement with *D'Amato*, refusing to apply § 1001 to the falsification of a district court order in private civil litigation intended to defraud the attorney's clients. Subsequently in *United States v. Lawson*, 809 F.2d 1514 (11th Cir. 1987), the Eleventh Circuit held that the defendant's production of false documents in a state court action brought by a city housing authority constituted a § 1001 violation where the housing authority was the agent of the United States Department of Housing and Urban Development and the defendant was attempting to improperly extract money which would have been authorized under HUD's contract. The court distinguished *D'Amato* and *London* as not involving attempts to deceive the government.

In the case at bar, the Court of Appeals opined that *D'Amato* was "distinguishable from the case at bar." *Hubbard*, 16 F.3d, at 702. But the Court of Appeals did not explain how the case was distinguishable, instead stating the following: "Without focusing on the distinguishing features, however, we simply hold that to the extent that *D'Amato* is similar enough to be controlling on this issue were this case being heard in the Second Circuit, we decline to follow it in the Sixth Circuit." *Id.* Oddly enough, however, the Court of Appeals stated that the "*London* holding seems sound",

but found that case distinguishable on the ground that "the attorney never made any fraudulent statement to the court or to the opposing party in any court document or proceeding." *Id.*

The rationale of *D'Amato* applies with equal if not greater force to the case at bar. The bankruptcy proceeding constitutes a private civil action. As in *D'Amato,* the Government was not a party. The only involvement of "Government" was in the sense that the bankruptcy court was involved. Moreover, the petitioner's responses to the trustee were not responses to a government official. "The [bankruptcy] trustee is the representative of the debtor's estate, not an arm of the Government. . .". *California State Board of Equalization v. Sierra Summit*, 490 U.S. 844, 845, 109 S. Ct. 2228, 2230, 104 L. Ed. 2d 910 (1989). The *London* rationale is, of course, the same. And the Court of Appeal's distinction of *London* is unsound because the petitioner's statements similarly were not made to the court. The fact that the petitioner's statements were made to the trustee does not, as previously noted, constitute a statement to the Government.



## CONCLUSION

For these reasons, the judgment of the Sixth Circuit should be vacated and the cause remanded with instructions to vacate the petitioner's § 1001 convictions.

Respectfully submitted,

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# RESPONDENT'S

# BRIEF

(6)

No. 94-172



# In the Supreme Court of the United States

OCTOBER TERM, 1994

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JOHN BRUCE HUBBARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

The Court's grant of certiorari is limited to the following question:

Whether petitioner's convictions under 18 U.S.C. 1001 for knowingly making false statements in pleadings filed with the bankruptcy court are barred by the so-called "judicial function" exception to Section 1001.

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## BRIEF FOR THE UNITED STATES

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 16 F.3d 694.

## JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. A petition for rehearing was denied on March 30, 1994. Pet. App. 20. On May 10, 1994, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 1994. The petition for a writ of certiorari was filed on July 27, 1994, and granted on October 31, 1994, limited to the question framed by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1001 of Title 18 of the United States Code provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 6 of Title 18 provides in relevant part as follows:

> As used in this Title:
>
> The term "department" means one of the executive departments enumerated in section [101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of bankruptcy fraud (Counts 1-4), in violation of 18 U.S.C. 152; three counts of making false statements in a matter within the jurisdiction of a federal department or agency (Counts 5-7), in violation of 18 U.S.C. 1001; and three counts of mail fraud (Counts 8-10), in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of 24 months' imprisonment on Counts 1 through 9, and to a consecutive term of five years' supervised release on Count 10. The court of appeals affirmed. Pet. App. 1-19.



1. On September 25, 1985, petitioner filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In December 1985, believing that petitioner had provided false information, the trustee filed a complaint under 11 U.S.C. 727 to prevent petitioner from discharging his debts through the bankruptcy. 2/1/91 (Morning) Tr. 87. In July 1985, a successor trustee filed an amended complaint, after being informed that petitioner had failed to disclose certain property that he owned or possessed. Pet. App. 2; 2/4/91 Tr. 15-19. The amended complaint alleged, among other things, that a well-drilling machine was stored at petitioner's residence and that parts to the machine were stored in a nearby warehouse. J.A. 4. In petitioner's answer, he denied each allegation "for the reason [that] it is untrue." J.A. 12; Pet. App. 4.

The trustee filed, in addition, a motion to compel petitioner to surrender the books and records of his businesses, alleging that "despite requests of the Trustee, the Debtor has refused to surrender all books, documents, records and papers relating to property of the Estate to the Trustee." J.A. 6-7; Pet. App. 2. Petitioner filed a response denying the allegation and asserting that he had produced the requested documents to the previous bankruptcy trustee. J.A. 10; Pet. App. 4.

2. On July 5, 1990, a grand jury returned an indictment against petitioner charging him with bankruptcy fraud, mail fraud, and making false statements in a matter within the jurisdiction of the federal bankruptcy court. Pet. App. 2. The false statement counts were based on the statements made by petitioner in his response to the trustee's motion to

compel and in his answer to the trustee's amended complaint. J.A. 14-16; Pet. App. 4.

The evidence at trial showed that when petitioner filed his answer, he knew that the well-drilling machine and machine parts were stored at the locations specified in the amended complaint. GX 21B; 2/4/91 Tr. 102-103; J.A. 15-16. The evidence also demonstrated that petitioner had not produced the requested books and records either to the original or to the successor trustee, as he had claimed in response to the motion to compel. 2/1/91 (Morning) Tr. 75-76, 79-80, 90-91, 94; 2/4/91 Tr. 9.[1]

3. On appeal, petitioner argued that he had been improperly convicted on Counts 5-7 because, among other things, Section 1001 does not apply to false statements made to a court when the court is exercising its judicial functions. The court of appeals rejected that contention. It recognized, initially, that this Court held in *United States* v. *Bramblett*, 348 U.S. 503 (1955), that the term "department," as used in Section 1001, is meant to describe all three branches of government. Pet. App. 7-8. The court of appeals acknowledged that several other courts of appeals distinguish the courts' administrative role from their judicial role, and carve out from the scope of Section 1001 false statements made to courts when they are exercising judicial functions. Pet. App. 9-10. The court concluded, however, that the "judicial function" exception is inconsistent with *Bramblett*'s teaching that Section 1001 is to be read broadly, and, after reviewing the underpinnings of the exception, held

[1] Petitioner did not surrender the books and records of the estate until well after he had filed his opposition, and then only in response to a direct order by the bankruptcy court. 2/4/91 Tr. 9, 14-17.



that it "does not rest on solid legal ground." Pet. App. 13; see also *id.* at 11 n.5.

In refusing to apply a "judicial function" exception to Section 1001, the court of appeals declined to follow its previous decision in *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967) (per curiam) (holding that Section 1001 does not apply to the introduction of false documents in a criminal proceeding). *Erhardt* had reasoned that application of Section 1001 in that setting would undermine the safeguard provided by the two-witness rule in perjury prosecutions. The court of appeals explained, however, that *Erhardt*'s rationale "has been significantly weakened, if not entirely undercut, by the abolition of the two-witness rule." Pet. App. 12 & n.6; see 18 U.S.C. 1623(e). The court further observed that "if we were to believe a limitation should be placed on § 1001 so that it did not overlap the purpose and scope of the federal perjury statute, this would not be the case in which to do it; none of the false statements here was made under oath and therefore none could be prosecuted as perjury." Pet. App. 13.[2]

## SUMMARY OF ARGUMENT

I. The federal false statement statute, 18 U.S.C. 1001, proscribes the making of a false statement "in any matter within the jurisdiction of any department or agency of the United States." In *United States* v.

[2] Judge Nelson dissented from the court's affirmance of petitioner's conviction on Counts 5-7. Pet. App. 18-19. In his view, *Erhardt* held broadly that Section 1001 "does not apply to conduct engaged in by the defendant in connection with the operation of a court's judicial machinery." Pet. App. 19 (internal quotation marks omitted). Because petitioner's false statements were made in an adjudicative context, Judge Nelson believed that *Erhardt* controlled and precluded petitioner's conviction. *Ibid.*

*Bramblett*, 348 U.S. 503 (1955), this Court rejected the argument that Section 1001 applies only to false statements made to executive agencies, and held that the term "department" refers to all three branches of the federal government. Although *Bramblett* involved a false statement to Congress, the Court's rationale expressly included the Judicial Branch, and the courts have since understood *Bramblett*'s holding to encompass false statements made to the judiciary. In his petition for certiorari, petitioner did not suggest otherwise, but claimed only that Section 1001 did not apply to the "judicial" (as opposed to the "administrative") functions of the courts. In his merits brief, however, petitioner now asserts that "department," as used in Section 1001, wholly excludes the Judicial Branch. Because that claim was not raised in the petition for certiorari, this Court should not address it. If the Court does address the claim, it should reject it.

Petitioner offers no special justification (other than his contrary view of the merits) for this Court to reconsider *Bramblett*. Although petitioner claims that his interpretation reflects a better reading of the text and history of Section 1001, the arguments that he now raises were raised by the appellee and correctly rejected by this Court in *Bramblett*. Section 1001 is, and was intended to be, a broad, catch-all provision that permissibly overlaps and fills the gaps between more specific prohibitions. It would be anomalous for this Court to hold that Congress intended to prohibit false statements to the executive and the legislature, but to countenance knowing lies to the courts.

II. There is no basis for the so-called "judicial function" exception to Section 1001. The text of the statute does not exclude false statements that implicate the core function of the Judicial Branch—the



adjudication of cases and controversies. Rather, that text and other indicia of legislative intent indicate that Section 1001 covers all authorized functions of government departments and agencies, including, as applied to the courts, their adjudicative functions. Nor is there any justification in policy for precluding the application of Section 1001 to false statements made in the context of adjudication. It should come as no surprise to participants in the judicial process that the knowing and willful falsification of material facts is subject to criminal penalties. The application of Section 1001 to such false statements does not undermine the ability of lawyers and parties to engage in traditional trial tactics, because those tactics have never included the knowing and willful making of false statements of fact. And the inconsistent manner in which courts have applied the "judicial function" exception underscores that, absent a sound basis in the text of the statute, courts should not fashion an exclusion from criminal liability under Section 1001 based on perceived policy concerns.

## ARGUMENT

### I. SECTION 1001 APPLIES TO FALSE STATEMENTS MADE IN MATTERS WITHIN THE JURISDICTION OF THE JUDICIAL BRANCH

In *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955), this Court construed the term "department" in Section 1001 to encompass all three branches of government. Petitioner contends that *Bramblett* is in error and that the term "department" means only the executive departments listed in 5 U.S.C. 101. Because petitioner failed to raise that claim in his petition for certiorari, this Court need not address it. If the Court does reach the issue, however, the question is not whether (as a matter of first impression) the term "department" should be construed

to include the Judicial Branch, but whether the Court's construction of Section 1001 in *Bramblett* should be reconsidered. In our view, not only does *Bramblett* represent a sound interpretation of the statute, but there is no justification for this Court to revisit this issue of statutory construction that the Court resolved nearly 40 years ago.

### A. *Bramblett* Applied Section 1001 To All Three Branches of Government

In *Bramblett*, a former member of Congress was charged with violating Section 1001 by falsely representing to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his official clerk. The issue before the Court was whether the Legislative Branch qualified as a "department" within the meaning of Section 1001. The six Justices who participated in the case unanimously concluded that, in the context of Section 1001, "department" includes the Executive, Legislative, and Judicial Branches. 348 U.S. at 509.

The Court noted that, as defined by 18 U.S.C. 6, the term "department" in Title 18 means one of the executive departments enumerated in Section 1 (now Section 101) of Title 5, "unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government." 348 U.S. at 508. In the Court's view, "[t]he context in which ['department'] is used [in Section 1001] calls for an unrestricted interpretation." *Id.* at 509. After a detailed review of the language, purpose, and history of Section 1001, the Court concluded that

> [i]t would do violence to the purpose of Congress to limit [Section 1001] to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "*department*," *as used in this context, was meant to describe the executive, legislative, and judicial branches of the Government.*



348 U.S. at 509 (emphasis added).

The statement in *Bramblett* that the term "department" covers the Judicial Branch was, in a formal sense, dictum, since the defendant had been charged with making a false statement to the Legislative Branch. But the overarching rationale of the Court's holding—that Section 1001 contains no restriction as to government component—does not allow for any distinction among the three branches. The Court did not conclude that the Legislative Branch qualifies as a "department" because of any characteristic unique to the Legislative Branch, and nothing in the text or history of the statute indicates that Congress would have wanted to proscribe the conduct of the former congressman in *Bramblett* while leaving unpunished an identical false statement by a judicial employee to a court disbursing office.

Since *Bramblett*, every court of appeals that has addressed the issue, even those adopting the "judicial function" exception, has agreed that Section 1001 applies to at least some false statements made within the jurisdiction of the Judicial Branch. *United States* v. *Masterpol*, 940 F.2d 760, 764 (2d Cir. 1991); *United States* v. *Poindexter*, 951 F.2d 369, 386-387 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 656 (1992); *United States* v. *Barber*, 881 F.2d 345, 349-350 (7th Cir. 1989), cert. denied, 495 U.S. 922 (1990); *United States* v. *Holmes*, 840 F.2d 246, 248 (4th Cir.), cert. denied, 488 U.S. 831 (1988); *United States* v. *Mayer*, 775 F.2d 1387, 1388-1392 (9th Cir. 1985); *United States* v. *Lawson*, 809 F.2d 1514, 1518-1520 (11th Cir.

1987); *United States* v. *Abrahams*, 604 F.2d 386, 392 (5th Cir. 1979); *United States* v. *Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967).

### B. There Is No Reason For This Court To Reconsider *Bramblett*'s Construction Of Section 1001

In his petition for certiorari, petitioner accepted that Section 1001 applies to false statements made to the Judicial Branch, and argued only that the statute's application in that context is subject to a "judicial function" exception; *i.e.*, that Section 1001 proscribes false statements made to a court only when the court is acting in an administrative capacity. Neither in his questions presented nor in the text of his petition did he suggest that Section 1001 has no application at all to the Judicial Branch. Petitioner now contends, however, that *Bramblett* was wrongly decided, and he urges this Court to overrule that precedent or restrict it to its facts. Pet. Br. 4-19. Those contentions should be rejected.

1. This Court ordinarily will consider "[o]nly the questions set forth in the petition, or fairly included therein." *Caspari* v. *Bohlen*, 114 S. Ct. 948, 952 (1994) (quoting Sup. Ct. R. 14.1(a)); see also *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 179 (1938) ("One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue."). While that limitation is not jurisdictional, *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991), and this Court has the power to consider an issue "antecedent to * * * and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief," *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993), the limitation serves valuable



purposes. The bar to raising new questions at the merits stage enables respondents to frame their reasons for opposing certiorari in a clear and concise manner and preserves the Court's ability to allocate its scarce resources in deciding whether to grant certiorari. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1533 (1992).[3] Accordingly, the Court will consider issues first raised in a merits brief "only in the most exceptional cases." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993) (per curiam); see also *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984).

This is not an exceptional case. Although the application of Section 1001 to the Judicial Branch presents an antecedent issue of statutory construction, the Court need not (and does not) explore all antecedent statutory issues before reaching the question on which it has granted review. For example, the Court held in *Kamen* v. *Kemper Fin. Servs., Inc.*, *supra*, that the demand requirement in a derivative action arising under Section 20(a) of the Investment Company Act of 1940 may be excused by futility, without "address[ing] the question whether [Section] 20(a) creates a shareholder cause of

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[3] This case illustrates the care with which respondents and this Court focus upon the questions presented in a petition for certiorari. Petitioner sought review of three distinct questions. The government opposed certiorari on two of those questions, but supported petitioner's request that the Court review the validity of the so-called "judicial function" exception. The Court granted the petition, but only as to the "judicial function" exception issue, and the Court reformulated the question presented with respect to that issue in order to frame it more precisely. Had petitioner argued in his petition that *Bramblett* should be reconsidered, the government and the Court could each have addressed that contention at the petition stage, which would likely have conserved significant resources.

action, either direct or derivative." 500 U.S. at 97 n.4. It is particularly unnecessary to reach the antecedent issue that petitioner seeks to raise in violation of the Court's rules, because that issue was decided by this Court years ago in *Bramblett*, it has not provoked a conflict in the circuits, and petitioner does not present an argument addressed to this Court's standards for overturning a statutory precedent. A petitioner seeking to challenge a precedent of this Court should at least be required to raise the issue in his request for this Court's review.

2. Although petitioner suggests that this Court need not overrule *Bramblett* to conclude that Section 1001 does not cover the Judicial Branch, Pet. Br. 8, he does not identify any principled distinction between the statute's application to Congress and its application to the judiciary. Nor does he explain how *Bramblett* could be confined to its facts—a false statement made to the Legislative Branch—without producing the anomalous consequence that criminal defendants may continue to be convicted under an interpretation of Section 1001 that the Court has implicitly suggested is incorrect. Accordingly, a decision declining to apply Section 1001 to the Judicial Branch is tantamount to repudiating *Bramblett*'s rationale—that the word "department" embraces all three branches. A determination to reconsider that rationale deserves the same consideration that this Court applies when it is asked to overrule a direct holding. See, *e.g.*, *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 733-736 (1977) (recognizing that an attack on the principle underlying a decision requires a determination whether to adhere to that decision as a precedent).

Petitioner has not attempted to carry the heavy burden of showing that the statutory holding of *Bramblett* should be reconsidered. Nor could petitioner



demonstrate that *Bramblett* should be revisited under this Court's traditional standards for the application of *stare decisis* in a statutory case. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171-174 (1989); see also *Hilton* v. *South Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 & n.34 (1986); *Illinois Brick*, 431 U.S. at 736.

3. In applying *stare decisis*, the Court has considered whether (1) the earlier decision failed to take account of the relevant language and legislative history; (2) intervening legal developments have removed or weakened the underpinnings of the prior decision; (3) the precedent stands as an obstacle to the coherence or consistency of the law; or (4) the precedent is outdated and inconsistent with current conceptions of justice or the social welfare. *Patterson*, 491 U.S. at 171-175. None of those circumstances exists with respect to this Court's holding in *Bramblett*.

a. Petitioner claims (Pet. Br. 6-15) that the text and the legislative history of Section 1001 support his interpretation of the statute. He raises no issues, however, that were not raised and correctly rejected by the Court in *Bramblett*. The appellee in *Bramblett* contended—as petitioner does here—that the language of Section 1001 and the definition of "department" and "agency" in 18 U.S.C. 6 limit the application of the false statement proscription to the Executive Branch; the appellee also asserted that Congress's identification of the Legislative Branch elsewhere in Title 18 argues against interpreting Section 1001 to refer to the legislature sub silentio. See Brief for Appellee at 4-13, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (No. 159) [hereinafter *Bramblett* Appellee Br.]. This Court rejected those arguments, concluding that it would be

unreasonable, in the context of Section 1001, to presume that Congress intended to proscribe only falsifications made to executive agencies. 348 U.S. at 509.

None of petitioner's textual arguments casts doubt on the Court's decision in *Bramblett*. Contrary to petitioner's understanding, Pet. Br. 6, the term "department" does not unambiguously exclude the Legislative and Judicial Branches. Section 6 of Title 18 expressly provides that, depending on the context in which it is used, the term "department" may describe any of the three branches of government. Moreover, the three branches have long been referred to as "departments" of government. See, *e.g.*, The Federalist Nos. 46-50 (James Madison) (Cooke ed. 1961); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("[T]he treaty addresses itself to the political, not the judicial department."); *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 500 (1867) ("The Congress is the legislative department of the government; the President is the executive department[;] [n]either can be restrained in its action by the judicial department.").[4]

Petitioner suggests (Pet. Br. 7) that because Congress has separately referred to "courts" and

[4] Petitioner's reliance (Pet. Br. 6) on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), is misplaced. The Court in *Freytag* discussed the meaning of the term "Department" in the context of the Appointments Clause of the Constitution. See *id.* at 885-888. As this Court explained in *United States* v. *Germaine*, 99 U.S. 508, 510 (1878), because the Appointments Clause "is * * * found in the article relating to the Executive, * * * the word as there used has reference to the subdivision of the power of the Executive into departments." The Court's conclusions respecting the use of "department" in that context are not relevant to the meaning of the term in distinct statutory settings. See *NationsBank* v. *Variable Annuity Life Ins. Co.*, Nos. 93-1612 & 93-1613 (Jan. 18, 1995), slip op. 10.



"departments" in some sections of Title 18, Congress must have viewed the word "department" as meaning only the "executive department." He concludes that because Congress did not specifically refer to "courts" in Section 1001, it must have intended to exclude them. That argument, again, is foreclosed by 18 U.S.C. 6, which expressly states that "department" may refer to any of the three branches of government if the context so indicates. While Congress did not specifically state whether "department," as used in Section 1001, includes all branches or merely the executive departments, the Court in *Bramblett* found that exclusion of the Legislative and Judicial Branches would, in the context of Section 1001, create unintended anomalies. 348 U.S. at 509. For example, under petitioner's interpretation, a false statement to an executive procurement office would be proscribed, while an identical falsehood to a congressional or judicial procurement office would go unpunished, even though the effect on the Treasury would be the same. Similarly, a false statement in an agency adjudication would be covered, but an identical false statement in an Article III proceeding or a congressional hearing would not. Those results are sufficiently anomalous to suggest that "department," as used in the context of Section 1001, reaches beyond the Executive Branch. See *Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 720 (1993) (finding the "context" caveat "help[ful] * * * in the awkward case where [the specific statutory definition] seems not to fit").

As this Court explained in *Bramblett*, the conclusion that the context of Section 1001 requires a broad reading of the term "department" is bolstered by the statute's evolution. The Court observed that the earliest predecessor to Section 1001 covered false claims "against any component of the Government," and that none of the

four amendments made to the statute between 1863 and 1934 "restrict[ed] the scope of the false statements provision to the executive branch." 348 U.S. at 505-506. While a statute's "context" may not ordinarily include its legislative history, see *Rowland*, 113 S. Ct. at 720 (construing the Dictionary Act, 1 U.S.C. 1), that principle does not justify revisiting what this Court has already determined to be Congress's actual intent. Congress did not enact a general definition of the term "department" in 18 U.S.C. 6 until 1948—more than a decade after the phrase "in any matter within the jurisdiction of any department or agency" was added to Section 1001. Act of June 18, 1934, ch. 587, 48 Stat. 996. Congress's codification of a general definition of "department" in 1948 could not have influenced Congress in 1934 when it inserted the "department or agency" clause into the statute.

Petitioner argues that *Bramblett* misread Congress's motivation for adding the word "department" to Section 1001 in 1934. The appellee in *Bramblett*, however, also argued that the sole purpose of the 1934 revisions to Section 1001 was to permit prosecution of false claims made to specific New Deal agencies and that the term "department" introduced in that legislation should therefore not be read to extend beyond the Executive Branch. Compare *Bramblett* Appellee Br. 19-21 with Pet. Br. 12-13. This Court took a contrary view, finding that nothing in the 1934 legislation "suggest[ed] that the new phrase was to be interpreted so that only falsifications made to executive agencies would be reached." 348 U.S. at 507. Since *Bramblett*, the Court has relied on that decision's analysis of the legislative history in reaffirming that "[t]he jurisdictional language was added to [Section 1001] solely to limit the reach of the false statements statute to matters of federal interest."



*United States* v. *Yermian*, 468 U.S. 63, 74 (1984); see also *United States* v. *Rodgers*, 466 U.S. 475, 481 (1984) (quoting *Bramblett*'s analysis of the 1934 amendment).[5]

Finally, petitioner (Pet. Br. 16-17), like the appellee in *Bramblett*, urges this Court to apply the principle of lenity. *Bramblett* Appellee Br. 21-25. The Court in *Bramblett* rejected that argument, holding that the rule of lenity "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." 348 U.S. at 510. Petitioner offers no reason why that issue should be decided any differently today. Moreover, petitioner cannot credibly argue in *Bramblett*'s wake that he (or anyone else) lacked notice that Section 1001 applies to false statements made to the judiciary.[6]

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[5] As the Court explained in *Yermian*, the predecessor to Section 1001 had required proof of specific intent to cause pecuniary or property loss to the United States. 468 U.S. at 70-71, citing *United States* v. *Cohn*, 270 U.S. 339, 346-347 (1926). When Congress amended the false statements provision in 1934 to delete that requirement, "the current jurisdictional phrase was necessary to ensure that application of the federal prohibition remained limited to issues of federal concern." *Yermian*, 468 U.S. at 74, citing *Bramblett*, 348 U.S. at 507-508.

[6] Petitioner contends (Pet. Br. 17) that "most members of the bar would be startled to learn that a false denial contained in an answer to a complaint filed in a federal court subjects the maker to criminal liability under § 1001." The statute does not penalize mere falsity, however. It reaches only false statements of fact made willfully and with knowledge of the falsity. *Bryson* v. *United States*, 396 U.S. 64, 69 (1969); *United States* v. *Yermian*, 468 U.S. at 64. Most members of the bar would presumably not be surprised to learn that it is a crime under Section 1001 knowingly to make false statements of fact in formal pleadings in a court of law.

b. No intervening development in the law has undermined this Court's holding in *Bramblett*. Congress did amend the statute in 1934 in response to *United States* v. *Cohn*, 270 U.S. 339 (1926), which had narrowed its application, see *United States* v. *Yermian*, 468 U.S. at 70-71, but Congress has never revised Section 1001 in response to *Bramblett*.[7] And, as we have noted, this Court has twice reaffirmed the rationale of that decision. See *United States* v. *Rodgers*, 466 U.S. at 481-482 (Section 1001 encompasses criminal investigations by federal law enforcement agencies; relying on *Bramblett* for the proposition that Congress's insertion in 1934 of the "in any matter" clause did not "[restrict] the scope of the statute * * * in *any* way"); *United States* v. *Yermian*, 468 U.S. at 74 (Section 1001 does not require proof that the defendant made the false statement with knowledge of federal agency jurisdiction; reaffirming *Bramblett*'s understanding that Congress added the "in any matter" clause solely to fill in the gap

[7] Petitioner argues (Pet. Br. 15-16) that the lack of congressional response to the lower courts' adoption of the "judicial function" exception suggests that Congress does not intend Section 1001 to apply to the Judicial Branch. Congress's failure to respond to lower court decisions, however, cannot create an exception to a statute that has no textual basis. Cf. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991). And, here, the claim of legislative acquiescence is particularly weak because of the relatively recent vintage of the "judicial function" exception. The exception was not suggested until 1962 and was not adopted by any court until *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967); before 1979, it was recognized by only two courts of appeals; and it gained a significant following only since the mid-1980s. See note 10, *infra*. In any event, the "judicial function" notion does not suggest that Section 1001 has no application to the judiciary, as petitioner argues; rather, it suggests that there is *an exception* to Section 1001's application to the courts.



left when it deleted language requiring a purpose to defraud the government).

c. *Bramblett* does not conflict with the surrounding body of criminal law. Petitioner points to specific prohibitions in Title 18 against litigation-related crimes that can be committed through false statements to the courts (*e.g.*, contempt, fraud, obstruction of justice), and contends that the existence of those specific prohibitions weighs against interpreting the more general false statement provision of Section 1001 to reach the same conduct. Pet. Br. 14-15. Section 1001 does overlap with numerous statutes that apply to judicial proceedings, but that overlap does not mean that Section 1001 is inapplicable to the courts. Section 1001 also overlaps with numerous statutes that proscribe false statements to executive agencies, see, *e.g.*, 18 U.S.C. 1010 (false statements to Department of Housing and Urban Development and Federal Housing Administration); 18 U.S.C. 1020 (false statements to Secretary of Transportation); 18 U.S.C. 1026 (false statements to Secretary of Agriculture), but those statutes have never been read to mean that Section 1001 is inapplicable to the specified executive agencies. Section 1001 serves as a broad catch-all provision, which overlaps and fills the gaps between more specific statutory prohibitions.[8] As petitioner concedes, Pet. Br. 15, prosecution under Section 1001 is permissible even when it directly overlaps a more specific provision. See *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979) (recognizing that a course of conduct may violate more than one criminal

[8] See *Reform of the Federal Criminal Laws: Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. Pt. 10, at 7477 (1974).

statute and that the government may prosecute under any applicable provision).[9]

It is also irrelevant whether the unsworn falsehood on which this prosecution is based would have provided cause to bar petitioner's discharge in bankruptcy. Pet. Br. 27 n.9. Section 1001 has independent force, regardless of the consequences a particular misstatement may have under other statutory provisions. See *United States* v. *Rodgers*, 466 U.S. at 482-483 (rejecting argument that Section 1001 should not apply to false statements made to FBI agents because Congress could not have intended to impose greater penalties for false unsworn statements under Section 1001 than the penalties imposed for false statements under oath by 18 U.S.C. 1621); *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941). We note, moreover, that contrary to petitioner's understanding, his fraudulent concealment of assets and books and records of the bankruptcy estate did provide a sufficient basis to prevent his discharge. See 11 U.S.C. 727(a)(2)-(4).

d. Finally, the holding in *Bramblett* is not inconsistent with current notions of justice. Petitioner argues (Pet. Br. 17-18) that application of the false

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[9] As petitioner notes (Br. 15 n.5), the United States Attorneys' Manual indicates that federal prosecutors should bring false affidavit cases under 18 U.S.C. 1503 or 1621, rather than under 18 U.S.C. 1001. U.S. Attorneys' Manual ¶ 9-69.267. That recommendation, however, is logical in light of the Manual's recognition elsewhere that "[s]everal courts have viewed the application of 18 U.S.C. § 1001 to the judicial branch more narrowly than *Bramblett* suggests." U.S. Attorneys' Manual ¶ 9-42.145 (referring to cases adopting "judicial function" exception). In any event, the Department of Justice's description of its prosecution policy does not constitute a binding construction of the statute.



statements prohibition to the judiciary "poses grave potential for abuse," because the government could misuse its power and indict opposing parties under Section 1001 to gain leverage in discovery disputes. Section 1001, however, applies only to knowing and willful falsehoods, not to mistakes or disagreements respecting discovery obligations. See *Bryson* v. *United States*, 396 U.S. 64, 69 (1969). Although government counsel could, hypothetically, pressure or harass an opponent with threats of prosecution under Section 1001, that same potential for abuse exists with respect to threats of prosecution for perjury, contempt, obstruction of justice, or other litigation-related crimes. In light of its experience, however, this Court presumes that prosecutors will act in good faith. *United States* v. *Mezzanatto*, No. 93-1340 (Jan. 18, 1995), slip op. 14-15; *Town Of Newton* v. *Rumery*, 480 U.S. 386, 397 (1987); *United States* v. *Goodwin*, 457 U.S. 368, 384 (1982). There is, accordingly, no warrant for reconsidering *Bramblett*'s conclusion that Section 1001 applies to all three branches of government.

## II. THERE IS NO JUDICIAL FUNCTION EXCEPTION TO SECTION 1001

Petitioner argues (Pet. Br. 19-34) that Section 1001 cannot be applied to false statements that fall within the "judicial functions" of the courts. While every court that has considered the question has held that Section 1001 applies to the Judicial Branch, many of those courts have distinguished between a court's administrative functions and its adjudicative functions, and have held

that Section 1001 applies to the courts only when they are acting in an administrative capacity.[10]

That so-called "judicial function" exception to Section 1001 originated from dictum in *Morgan* v. *United States*, 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963). In *Morgan*, the court of appeals upheld the conviction under Section 1001 of a layman who had falsely held himself out as an attorney in various court proceedings. The defendant argued on appeal against application of the statute to statements made within the Judicial Branch, contending that such application would criminalize traditional trial tactics. He claimed, for example, that the statute's false statement proscription would make a criminal offense out of a plea of "not guilty" or a lawyer's summation on behalf of a guilty client. 309 F.2d at 237. Responding to that concern, the court of appeals noted its belief that "neither Congress nor the Supreme Court [in *Bramblett*] intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'" *Ibid.* Section 1001's application to "traditional trial tactics" was not presented in *Morgan*, however, and the court held "only * * * that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'house-

[10] See *United States* v. *Masterpol*, 940 F.2d at 763-766; *United States* v. *Holmes*, 840 F.2d at 248; *United States* v. *Abrahams*, 604 F.2d at 392-393; *United States* v. *Mayer*, 775 F.2d at 1388-1392; *United States* v. *Wood*, 6 F.3d 692, 694-695 (10th Cir. 1993). Other courts have expressed doubt respecting the validity of that distinction. See *United States* v. *Barber*, 881 F.2d at 350; *United States* v. *Poindexter*, 951 F.2d at 387.



keeping' functions, not the 'judicial' machinery of the court." *Ibid.*[11]

Although the court in *Morgan* did not hold that there is a "judicial function" exception to Section 1001, that court's statement that the statute should not be read to proscribe traditional trial tactics "has somehow flowered into [a] broad exception" that now shields from criminal sanctions defendants who knowingly and willfully lie to courts so long as the lie affects only the court's adjudicative functions. See *United States* v. *Mayer*, 775 F.2d at 1392 (Fairchild, J., concurring). Courts of appeals that recognize a "judicial function" exception have held that Section 1001 does not prohibit false statements to FBI agents acting under the auspices of a grand jury, *United States* v. *Wood*, 6 F.3d at 694-695; false or fictitious letters of recommendation to be considered at sentencing, *United States* v. *Masterpol*, 940 F.2d at 763-766; *United States* v. *Mayer*, 775 F.2d at 1392; or the submission of false receipts as evidence in a criminal proceeding, *United States* v. *Erhardt*, 381 F.2d at 175. At the same time, courts have upheld convictions under Section 1001 for giving a false name to a magistrate judge, *United States* v. *Holmes*, 840 F.2d at 248-249; *United States* v. *Plascencia-Orozco*, 768 F.2d 1074, 1075-1076 (9th Cir. 1984); filing a false performance bond in bankruptcy court, *United States* v. *Rowland*, 789 F.2d 1169, 1172 (5th Cir.), cert. denied, 479 U.S. 964

[11] The D.C. Circuit has since distanced itself from *Morgan*'s dictum, expressing "doubt that the 'traditional trial tactics' rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding." *United States* v. *Poindexter*, 951 F.2d at 387 (refusing to create a parallel "legislative function" exception to the statute).

(1986); and making false representations on a statement of indigency, *United States* v. *Powell*, 708 F.2d 455, 457 (9th Cir. 1983), cert. denied, 467 U.S. 1254, rev'd on other grounds, 469 U.S. 57 (1984)—in each instance because the false statements were deemed to implicate only the administrative duties of the court.

In our view, the "judicial function" exception has no basis in the text or history of the statute, and finds no justification in policy. Correctly construed, Section 1001 applies to false statements made to the courts irrespective of the function they are then performing.

1. *There is no "judicial function" exception in the text of Section 1001.* The language of Section 1001 leaves no room for exempting false statements made in the course of a court's judicial functions. The text of the statute reaches false statements made (i) "in *any* matter" (ii) "within the jurisdiction" (iii) "of *any* department or agency." 18 U.S.C. 1001 (emphasis added). As explained above, the Judicial Branch is a "department" within the meaning of the statute. And a case or controversy is the quintessential sort of "matter" that comes "within the jurisdiction" of the Judicial Branch. As this Court has explained, the term "jurisdiction" is not to be given "a narrow or technical meaning" for purposes of Section 1001, *Bryson* v. *United States*, 396 U.S. at 70, but is instead understood to embrace "all matters confided to the authority of an agency or department," *Rodgers*, 466 U.S. at 479. Even in its narrowest meaning, however, the concept of "jurisdiction" extends to a court's "power to interpret and administer the law." *Id.* at 480.

In adopting the judicial function exception, some courts have reasoned that, if such a gloss on the statute were not applied, Section 1001 "could interfere with, if not swallow up, the pre-existing statutory scheme



[covering perjury offenses]." *United States* v. *Masterpol*, 940 F.2d at 766. See also *United States* v. *Mayer*, 775 F.2d at 1390; *United States* v. *Erhardt*, 381 F.2d at 175.[12] But there is nothing unusual about the application of more than one criminal statute covering the same conduct; in such situations, unless Congress clearly expresses a contrary intent, the government may charge a violation of any applicable statute. See *United States* v. *Batchelder*, *supra*. Nor is the "judicial function" exception needed to preserve "the time-honored and now necessary formality of requiring witnesses to testify under oath." Pet. Br. 31, quoting *Friedman* v. *United States*, 374 F.2d 363, 367 (8th Cir. 1967). The taking of the oath in judicial proceedings serves an independent function in reminding individuals of their obligation to tell the truth, and in serving notice that false statements subject witnesses to criminal prosecution.

Moreover, Section 1001 reaches many false statements made in the judicial context that are not covered by the statutory proscriptions against perjury. Not all statements made in judicial proceedings are sworn. For example, as the court of appeals observed, Pet. App. 13, "none of [petitioner's] false statements * * * was made under oath and therefore none could be prosecuted as perjury." Similarly, the perjury statutes do not cover false statements by attorneys made in the course of judicial proceedings, or the submission of unsworn

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[12] The court in *Erhardt* suggested that application of Section 1001 to adjudicative proceedings "would undermine the effectiveness of the two-witness rule." 381 F.2d at 175. While the traditional two-witness rule has been applied under 18 U.S.C. 1621, Congress has enacted a separate statute that prohibits perjury in judicial proceedings and that does away with the two-witness rule. See 18 U.S.C. 1623(e).

documentation, such as the false or fictitious letters of recommendation submitted to the sentencing judges in *United States* v. *Masterpol*, *supra*, and *United States* v. *Mayer*, *supra*. Because Section 1001 only partially overlaps with the perjury statutes, the existence of those parallel prohibitions does not justify the judicial function exception.

2. *The legislative history does not support the exception.* Nothing in the legislative history of Section 1001 supports a restriction of the statute to non-adjudicative judicial functions. As this Court found in *Bramblett*, 348 U.S. at 507, and reiterated in *Rodgers*, 466 U.S. at 481, the pertinent committee reports and floor debates contain no hint that the scope of the statute was to be limited "in any way." To the contrary, the legislative history affirmatively indicates that Congress intended the statute to cover *all* of the authorized functions of the federal departments and agencies. *Rodgers*, 466 U.S. at 481-482; *Gilliland*, 312 U.S. at 93.

When Congress intended to restrict the reach of the false statement statute to statements made in particular contexts, it defined those contexts expressly. For example, the Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696, specified that false statements were punishable only if they furthered "the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim." The 1918 amendment of the statute added the proscription against false statements made "for the purpose * * * of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. In the 1934 revision, however, Congress deleted any requirement about the purpose of the statement, see *Bramblett*, 348 U.S. at 506-508, and substituted the broad "in any matter" language. 48 Stat. 996. If Congress had intended at that time to restrict the



scope of the statute to false statements made with respect to non-adjudicative matters, it could have stated that limitation explicitly.

3. *The exception is inconsistent with the uniform application of Section 1001.* The so-called "judicial function" exception to Section 1001 conflicts with this Court's teaching that Section 1001 does not draw distinctions among the authorized functions of departments and agencies. In *United States* v. *Gilliland*, this Court rejected the view that Section 1001, as amended in 1934, continued to require a showing a pecuniary loss (see note 5, *supra*), and held instead that it encompassed as well false statements on matters within departments' regulatory functions. The Court reasoned that the purpose of the amended statute was broadly "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described," 312 U.S. at 93, regardless of the nature of those "authorized functions."

In *United States* v. *Rodgers*, the Court once again declined to construe Section 1001 as distinguishing among the authorized functions of governmental agencies. In that case, the defendant was charged with making false crime reports to the FBI and the Secret Service. The Court rejected as "unduly strained," 466 U.S. at 479, the view that Section 1001 is limited to false statements to agencies that have the power to adjudicate rights, establish regulations, and make final or binding determinations, *id.* at 477-478. Instead, the Court held that Section 1001 covers "all matters confided to the authority of an agency or department." 466 U.S. at 479. The Court explained that the only "differentia[tion]" permitted by the statutory language is between "the official, authorized functions of an agency or department

[and] matters peripheral to the business of that body." *Ibid.*

The Court's refusal to draw functional lines within Section 1001 is consistent with its general broad approach to the provision. In *Bramblett*, the Court held that the statute calls for an "unrestricted interpretation." 348 U.S. at 509. And in *Bryson*, the Court rejected efforts to read the word "jurisdiction" as a term of art with a limited meaning, and held that a "statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001," even if the statutory basis were constitutionally infirm. 396 U.S. at 70-71. Contrary to petitioner's novel suggestion—that broadly drafted statutes should be construed narrowly (Pet. Br. 29)—this Court has given Section 1001's expansive language its natural scope and has rejected attempts to impose judge-made limits on its application.

4. *The exception is not justified by policy reasons.* Petitioner relies heavily on policy concerns, arguing (Pet. Br. 23-25) that application of Section 1001 to the courts "is both unjust and absurd," because such application would penalize defendants' exercise of constitutionally protected rights and "[subject] traditional trial practices * * * to revolutionary change." Even if petitioner's policy arguments were persuasive, they would not affect the result in this case. As the Court explained in *Rodgers*, "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." 466 U.S. at 484. In any event, petitioner's policy concerns about applying Section 1001 to the courts' judicial functions are unfounded.

a. Petitioner's principal claim (Pet. Br. 23-27) is that it would disrupt traditional trial tactics to punish the



making of willful and knowing false statements of fact in adjudicative proceedings. Section 1001 does not penalize traditional trial tactics, however, because such tactics have never included the making of intentionally false statements of fact. Indeed, rather than protecting any legitimate form of litigation tactics, the "judicial function" exception has been applied by the lower courts to overturn convictions for submitting false or fictitious letters of recommendation to influence sentencing (*Mayer* and *Masterpol*), for making false statements to FBI agents acting under the auspices of a grand jury (*Wood*), and for submitting false receipts as evidence in criminal proceedings (*Erhardt*).

Nor, contrary to petitioner's assertion (Pet. Br. 23-25), does the application of Section 1001 to criminal proceedings impinge on the exercise of a defendant's constitutionally protected rights. The prohibition against making knowingly false statements of fact does not impair the presumption of innocence or inhibit vigorous efforts to challenge the government's case. As petitioner apparently concedes, Pet. Br. 24, a plea of "not guilty" does not come within Section 1001, because it is not a statement of fact. Rather, it is a formal notice that the defendant will require the government to carry its burden to establish guilt beyond a reasonable doubt. Nor does a good faith motion to suppress or exclude evidence fall within Section 1001. The statute prohibits only false statements of *fact*. Because legal arguments are not facts, the statute does not reach questionable (or even frivolous) contentions of law.[18] Finally, nothing in

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[18] Nor, contrary to the concern expressed in *Morgan*, 309 F.2d at 237, does a failure to introduce evidence, a motion to suppress, or a hearsay objection constitute "conceal[ment]" under Section 1001. To prove unlawful concealment of material facts under the

Section 1001 inhibits legitimate zealous advocacy. The provision's ban on lying does not preclude a forceful challenge by defense counsel to the probity or sufficiency of the government's evidence. And the Sixth Amendment right to effective assistance of counsel in criminal cases does not afford defense attorneys the right to lie on behalf of their clients. See *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986) (counsel's duty to his client under the Sixth Amendment "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

In any event, this case does not involve constitutionally protected conduct or mere zealous advocacy. Petitioner has been convicted of deliberately lying in formal pleadings to the bankruptcy court. Petitioner does not contend that the deliberate submission of false pleadings is a legitimate trial tactic. Instead, petitioner argues that his "filings fall within [traditional] practices," Pet. Br. 27, and that Section 1001 should not be applied to general denials (or, he says, to his more specific denials and averments), because in his view general denials—like a plea of "not guilty"—merely "put at issue" an entire cause of action. Pet. Br. 24. That argument does not hold true for general denials, and in any event would not assist petitioner.

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statute, the government must first establish a duty to disclose. See, *e.g.*, *United States* v. *Kingston*, 971 F.2d 481, 489 (10th Cir. 1992); *United States* v. *Richeson*, 825 F.2d 17, 20 (4th Cir. 1987); *United States* v. *Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987); *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983). A defendant has no legal duty to disclose unfavorable evidence. And it cannot be seriously suggested that counsel engages in "concealment" by objecting to the introduction of evidence on the ground that it is inadmissible.



As petitioner recognizes (Pet. Br. 25), although the common law practice of pleading general denials was retained by the drafters of the Federal Rules of Civil Procedure, a party may use a general denial under Rule 8(b) only if that party can "in good faith deny all the averments of the opposing party's pleadings." 2A James Wm. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 8.23, at 8-149 (1994); *id.* at ¶ 8.21, at 8-144; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1265, at 402 (2d ed. 1990). In addition, "[a] party interposing a general denial * * * is subject to the obligations of honesty in pleading set forth in Rule 11." *Federal Practice and Procedure*, *supra*, § 1265, at 402.[14] Although, as petitioner points out (Pet. Br. 25), neither the requirement of good faith nor Fed. R. Civ. P. 11 "bind[s] a defendant to his, her, or its responses for all time," or prohibits "averments of insufficient information or knowledge upon which to form a belief as to the truth of the complainant's allegations," both good faith and Rule 11 preclude the submission of knowingly false denials, general or otherwise. The fact that petitioner's denials and responses were "subject to further investigation, proof and judicial factfinding," Pet. Br. 25, provides no justification for his presentation of intentional lies rather than good faith responses. As the court of appeals noted, "whether or not it is a 'traditional trial tactic' to answer a complaint with affirmative

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[14] The commentators have recognized that "situations in which the complaint can be completely controverted are quite rare, which means that an answer consisting of a general denial will be available to a party acting in good faith only in the most exceptional circumstances." *Federal Practice and Procedure*, *supra*, § 1265, at 403; *Moore's Federal Practice*, *supra*, ¶ 8.23, at 8-149 ("A party will seldom be able to use a general denial in good faith.").

falsehoods, we need not sanction such action and therefore will not create an exception so broad as to include [petitioner's] conduct." Pet. App. 4 n.3.

b. The absence of any compelling policy basis for the "judicial function" exception is revealed by the fact that Section 1001 is applied to adjudicative proceedings in the Executive Branch. Many executive departments and agencies conduct quasi-judicial hearings to adjudicate matters falling within their jurisdiction.[15] If a judicial function exception were warranted because of concerns unique to adjudication, the exception ought to apply equally to adjudicative proceedings by executive departments and agencies. See *United States* v. *Mayer*, 775 F.2d at 1390 n.2. Yet the courts have routinely applied Section 1001 to false statements made in the context of agency hearings. See, *e.g.*, *United States* v. *Flint*, No. 92-50554, 1993 WL 169067 (9th Cir. May 19, 1993) (informal DEA hearing); *Leitman* v. *McAusland*, 934 F.2d 46 (4th Cir. 1991) (Department of Defense debarment hearing); *United States* v. *Krause*, 507 F.2d 113 (5th Cir. 1975) (NLRB formal hearing); *Stein* v. *United States*, 363 F.2d 587 (5th Cir.) (Tax Court), cert. denied, 385 U.S. 934 (1966). The courts' failure to apply the functional distinction across the board cuts against petitioner's argument that a judicial function exception is necessary to safeguard legitimate litigation tactics. Cf. *Rodgers*, 466 U.S. at 481 n.2 ("Unless one is simply

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[15] "[T]he Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication * * *. They are all *executive* officers. 'Adjudication,' in other words, is no more an 'inherently' judicial function than the promulgation of rules governing primary conduct is an 'inherently' legislative one." *Freytag* v. *Commissioner*, 501 U.S. at 910 (Scalia, J., concurring).



to read the phrase '*any* department or agency of the United States' out of the statute, there is no justification for treating the investigatory activities of one agency as within the scope of § 1001 while excluding the same activities performed by another agency.").

c. Because the "judicial function" exception has no foundation in the language or history of Section 1001, courts have applied it in varying and often conflicting ways. For instance, as one court noted, "[w]hether a statement or a proceeding is 'adjudicative' or 'administrative' often may be a close question." *Holmes*, 840 F.2d at 248. While the Fourth Circuit has concluded that false statements regarding identity made to a magistrate judge at a plea hearing fall within the court's administrative sphere, see *United States* v. *Holmes*, 840 F.2d at 248-249, the Fifth Circuit has determined that false statements regarding identity made to a magistrate judge at a bail hearing fall on the "judicial function' side of the line, *United States* v. *Abrahams*, 604 F.2d at 393. Also illustrative is the disagreement among the courts of appeals over whether the exception ought to apply to false statements by nonparties. Compare *United States* v. *Wood*, 6 F.3d at 695 (exception shields false statement by potential witness) with *United States* v. *Barber*, 881 F.2d at 350 (to the extent exception is valid, it would not shield false statements made to sentencing judge in another defendant's case). Although the many difficulties in applying the exception would not justify its rejection if Congress had mandated it in the statute, the absence of any textual basis or coherent policy rationale to guide the development of a "judicial function" exception argues strongly against its acceptance.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1995